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**OBSERVATIONS ON MILITARY LAW,**

**AND THE**

**CONSTITUTION AND PRACTICE**

**OF**

**COURTS MARTIAL,**

**WITH A SUMMARY OF**

**THE LAW OF EVIDENCE,**

**AS APPLICABLE TO MILITARY TRIALS;**

**ADAPTED TO**

**THE LAWS, REGULATIONS AND CUSTOMS**

**OF THE**

**ARMY AND NAVY OF THE UNITED STATES.**

**BY WILLIAM C. DE HART,**

**CAPTAIN SECOND REGIMENT ARTILLERY.**

**NEW YORK:**

**D. APPLETON & CO., 443 & 445 BROADWAY.**

**1863.**

~~W. J. G.~~  
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## PREFACE.

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SINCE the legal establishment of the Army and Navy of the United States, there has been no work produced, written for the express purpose, in conformity with the laws, regulations, and customs of the services, and intended as a guide for the administration of military justice.\* The works to which reference was generally made to assist the judgment of members of courts-martial, and to supply the want of experience which all felt to a greater or less degree, were the productions of a foreign country and intended for the government or direction of foreign military bodies.

It is true, that those books, generally, if not always, of English origin, embodied the leading principles of administrative justice; and from the similarity or identity of the laws of the two countries in many respects, were suited to some extent to fulfil the wants which led to the study of them:—But still there was a deficiency—a deficiency which was a source of frequent error, and one which could only find a remedy in a rule, or a system of rules by which the practice of courts-martial in our service should be consistently regulated.

The differences which necessarily exist, and which distinguish the practices of the American and British Services were not always discerned or appreciated by the young officer who resorted to English treatises on military jurisprudence to determine doubts or questions which arose in the course of his judicial duties;—and hence errors were frequent; the practice of courts-martial was both inconsistent and contradictory; and no settled interpretation was received of either the law or modes of procedure. This diversity arose from causes which were not always known to the American

\* The small treatise on Courts-martial by the late Major-Genl. Macomb, is no exception to the remark.



reader. It was the result of a different system of laws adopted to meet the peculiar wants of different bodies; and rules of practice which were in the one service based upon the immediate and direct commands of parliamentary enactments, were in the other received and acted upon, at times, as the expression of general principles of law.

The observation of such irregularities, which the author in his capacity as the acting Judge-Advocate\* of the army, was frequently called upon to notice, has been the leading cause to induce him to undertake the composition of the present essay.

In the performance of the task, it has not been his object to present novel or striking views, but simply to arrange the principles, and rules, and forms of procedure, which have been considered well settled,—and to accompany the statement of them with a brief argument, whereby the military reader might more fully comprehend the necessity, or the propriety of receiving them as such, for the regulation of trials by courts-martial.

Reference has been made to the most approved writers upon the subject of this treatise, and from their works opinions have been cited to support the particular views entertained by the author, which had already either received the sanction of our own practice, or which appeared to him as the most just to be followed; and such cases only have been quoted as were of authority by judicial or military sanction, to illustrate the rules and principles set forth.

In the conduct of this work the author has noticed the differences in practice which the law makes for naval courts, and referred in brief observations to the distinguishing rules for the two services. He has not undertaken to specify with minuteness the law or the regulations which govern the navy, because he deemed it sufficient for the objects in view merely to hint at the same, leaving to the intelligence of every naval officer to apply such subordinate to the leading principles of military jurisprudence, which it is the purpose of this treatise to explain.

He has also presented a concise view of the law of evidence, and particularly such portions of that subject as are likely to be most needed in the course of military trials; and he has likewise given a more extended notice of the method and course of examination of witnesses than is contained in other military books of a like

\* The author was employed in that capacity for a considerable space of time, under the orders of the War Department.

character;—and from which he feels confident that much advantage and convenience may be derived.

The writer is aware that with many readers mere originality is often regarded as the excellence of new books. In a work like the present one, such should not be expected or desired. All that is necessary, is a consistent statement of established principles in a judicious and practical form, with such remarks as may distinguish their applicability to the requirements, according to the laws and customs which govern them, of the land and naval services.

As to the interpretation of the military statutes designed for the government of the Forces, he has made but a passing reference to a few of them. To treat fully upon this part of the subject would require a greater space than the proposed limits of this volume would allow,—and to be properly executed would demand a consideration of the social and political state, and the “influence of manners upon laws, and the force of opinion,” which have controlled the military legislation of the country.

Such are the considerations which have directed the thoughts and labours of the writer. And in now presenting the results of them to the notice of his professional brethren, and to the public at large, he asks their indulgence for imperfections which will undoubtedly be seen,—hoping too that they may find such advantage or benefit from the work submitted, as to justify their kindness, in overlooking, without critical severity, the errors it may contain.

*Elizabethtown, N. J., August 1st, 1846.*

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# PRACTICE OF COURTS MARTIAL.

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## CHAPTER I.

### CONSTITUTION OF COURTS MARTIAL.

IN considering the military laws of the United States, it is not necessary to refer to a period anterior to that when they ceased to be English colonies. The military establishment, and the regulations by which it was governed, were, during the state of colonial dependence, determined by parliament and the general authority vested in the sovereign of Great Britain, and by powers exercised from time to time, as local or particular exigencies required, by the legislative assemblies of the respective colonies.

The following observations from "Dupin's View of the Military Force of Great Britain," will show the extent of the military authority of the sovereign of that nation:

"By the constitution of Great Britain, the sovereign is vested with the supreme military authority. His orders, and his alone, are to be obeyed, as long as they are in unison with the fundamental laws of the empire. Beyond this, obedience itself would be deemed treason to the state, whatever the rank or station of the offender.

#### CHAPTER I.

Not necessary to refer further back in considering the military laws of the U. S. than when the colonial government ceased.

Of the Parliament, and the military capacity or powers of the British sovereign.

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"The sovereign power of the British nation is exercised in plenitude by the parliament of the United Kingdom, and without its authority no military force can be levied or maintained. It fixes the number of men whom the sovereign may retain or summon under his colors; and finally establishes the principles of criminal jurisprudence to which it is necessary to subject the soldier.

"This law (the Mutiny Act) determines the nature and extent of the punishments which can be inflicted upon the military citizen. In certain cases it is left to the discretion of the judges to mitigate the penalties according to the circumstances of the extenuation in the guilt of the offenders. It authorizes the sovereign to ordain by Articles of War, with regard to crimes not specified by the military law, every penalty not reaching to death or mutilation. An unbounded authority! and utterly incompatible with the government of a free people, if the general liberty, if the moderation of the sovereign and his ministry did not combine to restrain in practice the latitude of an arbitrary power, which is the more formidable, as it has the sanction of law."

The above extract may also serve to contrast the greater limitations imposed upon the military authority of the chief magistrate of the United States. Congress too, is not, as the British parliament is said to be, omnipotent, and cannot therefore, exercise the power of the nation in plenitude, but is restrained by the fundamental rules of a written constitution. By the constitution the president is the commander in chief

of the land and naval forces of the United States, but he cannot ordain any penalty for any military crime, not expressly declared by act of congress.

## CHAPTER

## I.

Military authority of the president of the United States and of the powers of Congress. The president not competent to ordain penalties for military crimes. Military laws declared by Congress.

The rules and articles, for the government of the armies and navy of the United States are declared by law, unlimited in duration, though subject at any time to modification or repeal; and in this respect are like the mutiny act of Great Britain, by which a standing army is authorised for the space of one year only, and which is, therefore, annually re-enacted. But although the legislative restrictions in regard to the duration of military bodies have been less precise in this country than in England, there has been, nevertheless, an equal jealousy and fear of standing armies; and the same principle is as vital now as it was, when the old congress on the 14th October, 1774, declared that—"keeping a standing army, in several of the colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."

The system of American military jurisprudence is to be considered as commencing with the Revolution. When the difficulties and dissensions between the American colonies and Great Britain had reached a point from which it was quite apparent that neither party would recede, and that the question of differences was therefore to be settled by the arbitrament of arms, congress, June 14, 1775, authorised a military force of six regiments. On the following day it was resolved that a general be appointed; and the articles of war were first ordained for the

American military jurisprudence commences with the Revolution.



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I.

government of the American army on the 30th day of June, 1775. On the 7th of November following, some additional articles of war were made; and these constituted the governing military rules to the 20th of September, 1776, on which day by resolution of congress, it was declared that, "the rules and articles of war by which the said armies have heretofore been governed, shall be, and they are hereby repealed."—and others were substituted in their place.

The rules and articles of war adopted and recognized under the constitution.

These rules and articles were adopted and recognized under the constitution by the act of congress, September 29, 1789, and the law continued in force until it was repealed and supplied by the act of April 10, 1806.

The military code established by the act of April 10, 1806.

The act of congress approved April 10, 1806, is the military code established for the government of the armies of the United States, and it embodies the authority by which courts-martial may be assembled, and can act.

By its provisions, general, regimental and garrison courts-martial are authorised, and the necessary power conferred upon certain officers to appoint the same. The composition of these several courts, from the superior to that of the inferior jurisdiction, is clearly described, as well as the persons to whom the power of appointment is delegated.

There is, however, an exception made to the general rule established by this act, and which is found in an act of congress of May 29, 1830. By this it was enacted "that whenever a general officer commanding an army, or a colonel commanding a separate department, shall be the accuser or prosecutor of any officer of the army of

the United States under his command, the general court-martial for the trial of such officer shall be appointed by the president of the United States."

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I.

Independent of this special act, the president of the United States, being by the constitution of the country, the commander-in-chief of the army and navy of the United States, is competent at all times to appoint general courts-martial. The law of May 29, 1830, was founded upon the presumption, that an accused person, brought to trial by the order of his commanding officer, who had the appointment of the court and the revision of its proceedings, might suffer great prejudice. While the abstract principle of justice which gave origin to this law may to some extent be acknowledged, the practice under it, and the rule which it enforces, has been found to be, and under the usual circumstances attending an army in the field removed at a great distance from the seat of government would necessarily prove, of considerable hindrance and prejudice to the public service.

Exception to the right to appoint courts martial, by act of May 29 1830.

The act of 1806 fixes the number of members necessary for a general court-martial at five for the *minimum*, and thirteen for the *maximum*, while any other number between those extremes is competent to exercise all the judicial powers of the court.

Of the number of members, for a general court martial.

The same act likewise authorizes the commander of a regiment or corps, to appoint for his own regiment or corps, courts-martial to consist of not more than three commissioned officers for the trial of cases not capital:—and for the same purpose all officers commanding any of the gar-

Of regimental and garrison courts martial, how appointed.

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I.

risons, forts, barracks, or other places, where the troops consist of different corps, may assemble courts-martial to consist of three commissioned officers.

Who may appoint general courts martial.

A *general court martial* then can only be appointed or assembled by the commands of the president of the United States; a general officer commanding an army; or a colonel commanding a separate department. Such a court is of the highest military judicial authority; while the inferior courts, as the *regimental court martial* to be appointed by the commanding officer of a regiment or corps; and the *garrison court-martial*, appointed by the commander of a fort, barrack, or other place, are of very limited jurisdiction, to which farther reference will be made in a subsequent chapter.

Warrant for the assembling of a court martial.

The warrant for the assembling a court-martial, or the appointment of members to compose the same, is in the form of an order, and issues directly from the officer to whom the law has delegated such power.

Power to appoint courts martial cannot be delegated.

For many years, and from a period anterior to the war of 1812, up to as late a date as the year 1841,<sup>1</sup> it had been customary for commanding officers, to whom the right of assembling general courts-martial had been given, to delegate such authority to inferior commanders, at least so far as to authorise them to name or appoint the members of the court. This was indeed the very essential of the right, and was in fact assuming a legislative power to confer upon a subordinate, an authority to determine the composition of a court-martial, who possessed no original

<sup>1</sup> See Genl. Order 71, of 1841.

power to order a court. This erroneous practice undoubtedly had its beginning in the supposed analogy in similar cases, to be found in the British army. From the fact that the rules and articles for the government of the armies of the United States, were derived immediately from the English military laws, it was a very natural conclusion to suppose, that such practice was the interpretation of the law. Whereas, had more accurate attention been given to the subject, it would have been seen, that the authority to delegate to another the power to assemble or appoint courts-martial, was an authority derived expressly from statute.<sup>1</sup>

But further than this general reasoning against the propriety, or legality of such a rule, we find a special objection to it in the spirit of the act of May 29, 1830, before quoted. By that act, the president of the United States is required in certain cases to appoint the court, and should such a rule obtain as that now under consideration, it is very evident that by its application, the intention of the law would be defeated, and its entire operation be completely annulled.

It has, therefore, been decided that no officer of the army can empower another to act in his stead in the appointment of courts martial. He alone to whom the law has given the authority to act in such cases must appoint the court; and no right to delegate such authority can be exercised without the express sanction of law.<sup>2</sup>

At an early period of the Revolution, congress

Naval regulations.

<sup>1</sup> Mutiny Act,

<sup>2</sup> See decision in the case of Capt. S. McKenzie, 2nd Regt. Artillery. August, 1845.

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took into consideration the state of the naval defences of the country, and on November 28, 1775, adopted rules and regulations for the government of the same. An act for the government of the navy was passed March 2, 1799, which continued in force until repealed and substituted by the act approved April 23, 1800.<sup>1</sup>

Of naval courts martial, who may appoint, and how composed.

By the provisions of the 35th article of this enactment general courts martial for the navy, "may be convened as often as the president of the United States, the secretary of the navy, and the commander in chief of the fleet, or commander of a squadron, while acting out of the United States, shall deem necessary."

Such general courts martial shall not consist of more than thirteen nor less than five members; and as many members shall be summoned, not to exceed thirteen, on every such court, as can be convened without injury to the service. "And in no case, where it can be avoided, without injury to the service shall more than one-half the members, exclusive of the president, be junior to the officer to be tried."

Marine corps, how governed.

The marine corps, is also a distinct organized military body, and subjected to the laws and regulations established for the government of the navy, except when detached for service with the army by order of the president of the United States.<sup>2</sup> It will not be necessary, therefore, to make any special reference to this body, as they are subject to either the laws governing the army or the navy, according to the particular service with which they may be associated.

In conformity with the acts of congress re-

<sup>1</sup> Naval Laws, pp. 18. 47. 59.

<sup>2</sup> Ibid. p. 156.

ferred to, all courts-martial are appointed and find their sanction. Deriving their origin and powers from the same source from which flow the statutes of the land, the same respect and deference to their character and acts are due, which every citizen is bound to observe towards the ordinary courts of civil judicature.

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## CHAPTER II.

### OF JURISDICTION.

#### CHAPTER II.

Origin of military courts.

THE institution of military courts had its origin, undoubtedly, in times of antiquity from the relations which subsisted between the powers of an absolute government, and the people subjected to its sway; and was a very convenient tribunal by the summary exercise of its authority for the suppression of license and excess of the soldiery, as well as a ready engine of despotism, whereby it might execute its purposes or gratify its passions. From the application of it to the military state of a people, which indeed, was the state in which the early period of most nations was passed, it was very easy to continue its application to the civil or social condition of the same people when peace, and its attendant arts and occupations, and the consequent progress in civilization had imposed upon them other hopes to animate their hearts, and other motives to embellish life.

The court of chivalry, the fountain of English martial law.

The Court of Chivalry, or Marshal's court, is said to be the fountain of English martial law.<sup>1</sup> This court was holden by the lord high constable and earl marshall, two officers of high authority and extensive command, in all matters touching the subject of war; and these officers claimed and exercised a ministerial, as well as

<sup>1</sup> Adye.

a judicial authority. There is no certain evidence, or prints of footsteps in past times of the original institution of the office,<sup>3</sup> but, probably, it grew out of the necessities which manifested themselves when large bodies of men were assembled for military organization and service.

In the progress of time these officers, from the looseness of the terms in which authority was delegated to them, gradually made many usurpations upon the rights of the subject and the jurisdiction of the civil departments, or ordinary courts of the realm, and to such a height did it attain, that it was found necessary to limit and ascertain its lawful jurisdiction by statute.<sup>1</sup>

During the troublous times of the institution of this court, amidst civil dissensions and martial violence, it was not at all strange that it should mix up with its decisions questions pertaining rather to matters of purely civil concerns, as well as those of "honor and arms," for which it was altogether intended. The absence of constitutional restraints upon the king, by whom the authority to the court was delegated, made it both easy and safe for it to transcend a wholesome jurisdiction, because it was, in fact, but the exertion of the kingly prerogative itself, and found thereby an encouragement to embrace within its sphere of action the most diverse questions, and common subjects, which might be agitated in dispute between subject and subject.

The interposition of statutory regulation, (13 R. II., ch. 2,) by curtailing its authority, lessened its abuses; and the court, for various causes,

<sup>1</sup> Hawkins' Pleas, b. II., chap. iv.    4 Coke's Inst.

<sup>2</sup> Ibid. Pleas, b. II., chap. iv.



## CHAPTER

## II.

The character of martial law much modified since the English Revolution of 1688, and its application restricted.

Opinions of eminent jurists,—Sir Matthew Hale and others.

such as the abolition of the hereditary authority of the constable, and the state of uncertainty with respect to the judicial powers of the constable and marshal, gradually lost its consideration, and its jurisdiction has gone entirely into disuse.

The character of martial law, however, as it existed prior to the revolution of 1688, and subsequent to that period, has undergone a great change; and the application of it indiscriminately to all classes of persons, and for every description of offences, is no longer tolerated. The feeling which was engendered in the minds of the people of England by the harshness with which the sovereign at times exercised this power, before strong constitutional restraints were imposed upon his will, is clearly to be traced in the opinions and writings of some of the most eminent of their legal men. Sir Edward Coke, who lived during the reign of Elizabeth and James, was very decided in the expression of his feelings; and Sir Matthew Hale, another eminent lawyer, who lived at a later period, during the time of Charles II., has given his most decided disapprobation of martial law as it then existed, or was exercised. "It is," says he, "in truth and reality no law, but something indulged rather than allowed as law;"<sup>1</sup> and it is laid down as a principle, that if one "who hath a commission of martial authority doth in time of peace hang or otherwise execute any man by color of martial law, it is murder."<sup>2</sup>

<sup>1</sup> Hale's Hist. Common Law.

<sup>2</sup> Hale's Pleas of the Crown, Coke's Inst., and 1 Blackstone's Com., 413.

The above, it is to be remarked, must be understood as applying to those periods of English history, when the kings, especially those of the family of the Stuarts, claimed the exercise of prerogative directly opposed to the declarations of Magna Charta: and although Sir William Blackstone, the able and learned commentator on the laws of England, has been strongly censured by some military writers<sup>1</sup> as deliberately adopting and avowing the same prejudices, under very dissimilar circumstances, yet it seems hardly reconcilable with the facts attending the times in which he wrote;<sup>2</sup> and the context by which his observations are qualified; to suppose him to have committed so glaring an inconsistency.

The belief that his observations, upon that portion of his subject, are rather relative to the history of the past, than indicative of any truths of his own day, is sustained by what is known to have been (as it still is) the real source of military authority, and thus the true interpretation of his words is arrived at. This is not only a just inference, so far as it regards the merits of the question, but it likewise dissipates the danger from the supposed error of so clear a mind,—which from its weight of authority, might pass without question, as an established legal truth.

But the days when arbitrary rulers could exert an irresponsible power for the gratification of personal objects, have passed away, and the doubts which confused, and the fears which enfeebled the minds of individuals or of commu-

The legislature is the supreme power of the state, and by which military law is enacted.

<sup>1</sup> Tytler and Adye.

<sup>2</sup> Geo. III.

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II.

nities, when subjected to the rule of authority which claimed, as it likewise exercised, the right of disposing of private and public interests, are dissipated or chased away by the light and warmth of humane and liberal government. Under constitutional forms, the legislative is the supreme power of the state, and it is thence in our country, that military courts, as well as the civil courts, derive all the power which they possess for the exercise of their appropriate functions. Flowing from the same source, and imbued or endowed with the like essence of judicial power, the military and the ordinary courts of civil judicature, within the spheres of their several jurisdictions, are deserving of the same regard, and entitled to a like respect.

Military law is part of the law of the land, and entitled to respect and obedience.

It is then clear that martial, or the law military, as it exists in this country, forms part of the law of the land, and as it is enacted by the same authority, so has it the same binding force, or the same positive obligation upon those to whom it is intended to apply, as the civil statute law has upon the citizens in general.

Necessity of understanding and fixing limits to military authority, or the jurisdiction of courts martial.

An institution, thus being clothed with judicial powers, and which may be exerted in the consideration and decision of questions of the most momentous description, affecting not only the passing or momentary interests of parties, but reputation and even life itself, certainly claims very serious thought to ascertain and fix definite and understandable limits to its authority. An inquiry of this kind in relation to military courts, seems the more necessary because, they who are called upon in the character of judges to administer justice through its means, may

also be cited before the same tribunal, as the accused, whose acts are subject to its scrutiny.

## CHAPTER

## II.

The profession of arms, offering but few opportunities for the acquisition of that species of knowledge which, in a technical form, is made most available in courts of law; and the youth and inexperience of a great number of its members, being such as to unfit them for the decision of questions, depending even upon settled principles of interpretation, when called upon suddenly to act, much less those which are involved in subtle arguments and intricate circumstances—make it still more desirable, that the jurisdiction of the body, which from time to time they are called upon to exercise, and to whose authority they are at all times subject, should have its limits defined, as clearly as possible both for their guidance and their safety.

The constitution of the United States has clearly provided for the right of personal security, guarded by provisions drawn from the great charter of English liberty, and fundamental acts of parliament. The substance of such provisions is to be found in the Vth and VIth amendments of the constitution. By the Vth amendment it is declared that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."—Under this exception military courts

Courts martial have cognizance of military crimes under the constitution

take cognizance of such matters as justly fall

## CHAPTER

## II.

within their competency, and proceed against offenders, according to the language of the constitution, by "due process of law," which terms applied, in reference to this subject, are convertible with those of, *by the law of the land*.<sup>1</sup>

It may, perhaps, be useful to attempt here a definition of military law, as thereby, supposing it to be accurately defined, a nicer observation of its true character may induce a greater caution in its application.

Definition of  
military law.

Military law is that branch of the laws which respect military discipline, and the government of persons employed in military service. It is not exclusive of the common law, for a soldier does not cease to be a citizen,—on the contrary he is a citizen still, capable of performing the duties of such, and amenable to the jurisdiction of the civil courts for his acts or conduct in that capacity. It is in fact a rule superadded to the ordinary law for regulating the citizen in his character of a soldier.<sup>2</sup>

It will be perceived that the leading characteristic of this definition is, that military law cannot be applied for the regulation of the conduct of persons in private or civil life; nor does it exclude the operation of the common law—for although the civil courts cannot take cognizance of military offences, as such, strictly speaking, yet the principle of the superiority of the civil over the military authorities is clearly set forth by the 33d article of war, and all officers are required thereby to deliver over offenders or accused persons, to the civil magistrate, and to be aiding and assisting the officers of justice in

<sup>1</sup> Kent's Com., vol. ii. p. 10.

<sup>2</sup> Encyc. Brit.

apprehending and securing the person of the accused in order to bring him to trial: and the penalty denounced by the same article against any officer who shall wilfully neglect, or shall refuse, upon application, to deliver over such accused commissioned officer or soldier to the civil magistrate, or to be aiding and assisting to the officers of justice in apprehending such accused persons, is cashiering.

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It must be understood, however, that the term martial law has a different interpretation from that of military law. Military law, as has been stated above, is a rule for the government of military persons only; but martial law is understood to be that state of things when, from the force of circumstances, the military law is indiscriminately applied to all persons whatsoever. The distinction is thus expressed by a writer on military law: "Martial law extends to all persons; military law to all *military* persons, but not to those in a *civil* capacity."<sup>1</sup>

Of the distinction between martial and military law.

How and where, under particular conjunctures of the time, martial law may be declared, and by whom, is not here considered; but the proclamation of such a rule within the limits of the United States is a very questionable proceeding, and thought to be an "excrescence" not warranted or sanctioned by any "distemper of the state." The substitution of this power for the civil courts, subjects all persons to the arbitrary will of an individual, and to imprisonment for an indefinite period, or trial by a military body. Of such high importance to the public is the preservation of personal liberty, that it has

Martial law within the limits of the U. S. considered unconstitutional.

<sup>1</sup> Hough on Courts Martial, p. 384.

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been thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the citizen.

Now, to guard against such abuse, the constitution guarantees the privilege of the writ of *habeas corpus*, which it declares "shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it"—and the intervention of congress is necessary before such suspension can be made lawful. Such too is the doctrine of the British constitution, where the crown, invested with high prerogatives, is yet most scrupulously restricted in all that relates to the liberty of the person of the subject. In commenting upon this part of the laws of England, Mr. Justice Blackstone says, "but the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure (the arbitrary imprisonment of a person) expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorise the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing."<sup>1</sup>

As the promulgation and operation of martial law within the limits of the Union would necessarily be a virtual suspension of the *habeas corpus* writ for the time being, it would consequently appear to stand in opposition to, or be

<sup>1</sup> Blackstone's Commentaries, 135. The British Parliament is said to be *omnipotent*!

in conflict with, that provision of the constitution above cited.

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As the army, as has been above stated, is established by the highest power of the state, with a definite shape and legal existence, it must thereby be received and acknowledged as a constitutional body. From the moment it became an organ of legislative creation, it likewise became an object of legislative control,<sup>1</sup> and hence the institutions intended for its government, are derived from the same source as those which affect the mass of community.

The army is a constitutional body.

The jurisdiction of courts-martial is special and limited, arising from the cognizance of crimes as committed by individuals, that is, by individuals subject to military law; and the crimes or acts are such as are repugnant to military discipline, and are pointed out by law, by the general regulations for the army, and by the custom of war.

The jurisdiction of courts-martial is special and limited.

Those acts defined by law, are sufficiently distinct for the observation of members of military courts, whereby they may regulate their proceedings, and no embarrassment can arise in regard to the propriety of making them the subject of military investigation.

The general regulations for the army are a permanent body of rules for the better ordering, and methodical arrangement of subjects of military concernment, and have a view to establish uniformity in the affairs of the army, by determining to a greater or less degree the requisite minutiae and detail. Their character, while mandatory, is also ministerial, and proceeding

General regulations for the army.

<sup>1</sup> Samuel's Law Military, 169.



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from the president of the United States, the highest military authority, claims the utmost respect, observance, and obedience. It is true that they are not in the nature of a subordinate legislation to determine or define offences, and affix penalties, for that belongs to congress only, and such are set forth in the rules and articles of war ; but they are of the nature and character of orders, pertaining to the executive and administrative branches of the service, and although they denounce no punishment in terms, yet the neglect or positive breaches of their requirements, are immediately referable to the established laws for the enforcement of discipline, to which they appeal for an appropriate sanction.

The custom of  
war.

The custom of war is the unwritten, or common law of an army. In order to apply it to any particular case, it must be certain and well defined, and clearly not opposed to any law or regulation. The custom of war is rather sought for, as explanatory of some doubtful question in which, without its aid, a decision might be uncertain, than as a source of authority by itself. It must be understood too that a custom to have any validity, besides having the qualities above mentioned, must also be a custom of the army, for the government of which it is intended to be applied. To resort to a foreign military service and draw thence customs of war which are genuine and acknowledged in such service, might be very illegal when introduced into our own, as the circumstances, or conditions which called them into existence, and continued them in being, in the one, might be entirely wanting

in the other. It is an authority which ought to be well scrutinized before allowed to have a determining influence. The customs and usages of an army, are, when considered in contradistinction to the positive laws and regulations for the same, generally pretty well understood, and when adduced as illustrative of the propriety of the forms adhered to, or the interpretation of acts, should have the certainty of an established fact.

By the 96th article of war, it is declared that "All officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay or hire in the service of the artillery, or corps of engineers in the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers of the other troops in the service of the United States."

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What description of persons subject to the rules and articles of war.

The provision of this article is further extended and declared in subsequent acts of congress for the modification of the military establishment; and that the forces authorized, and which are described as consisting of "officers, non-commissioned officers, artificers, musicians, and privates shall be subject to the rules and articles of war."<sup>1</sup>

The word *officer* wherever used in the military enactments, or regulations, is to be understood as signifying a *commissioned* officer. *Non-commissioned* officer is likewise synonymous with the term *soldier* in various portions

The word "*officer*" in the military laws, means a *commissioned* officer; and *non-commissioned officer* is synonymous with *soldier*.

<sup>1</sup> Act of Congress, March 2d, 1821, § II,—and Act of Congress, July 5, 1838, § I.

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of the rules and articles of war.—So, for instance, in the 28th and 33d articles. This conclusion is warranted by the intention of the law, and was many years ago made the subject of judicial decision. In the case of *Lloyd vs. Wooddall*, 1. Sir Wm. Blackstone's reports, p. 29, it was so decided, and one of the judges expressed himself in relation thereto by saying, "A sergeant is a soldier with a halbert, and a drummer is a soldier with a drum."

There is another class of persons, comprising a great number of individuals, who are, under particular circumstances of military service, held amenable to martial law, and liable to be tried by courts-martial.

Followers of  
the army.

Armies when engaged in active operations, are, at all seasons, accompanied by a large train of followers, who minister to its convenience and comfort. The various description of persons, included under that appellation, have granted to them certain privileges, such as living within the boundaries of the camp, and protection to their persons and property, dependent necessarily upon the essential conditions of good order, quiet, subordination, and fidelity to the state. The great and important interest to the nation involved in the movements of an army, which, for certainty of action, uniformity of conduct, and ultimate success, must rely mainly upon a system of rigid discipline, has caused the rule which applies every where else for the protection of the civilian, to be somewhat modified, or even, for the time, to be entirely set aside;—hence, the custom which prevails in the field, of trying persons not connected with the army by

courts-martial, must have arisen from, as it depends on, necessity.<sup>1</sup> Were any other principle for the regulation of such persons admissible, it is certain that an army might suffer the greatest detriment, and a way might thereby be opened for the easy communication with the enemy, and the acquisition and transmission of daily intelligence. Disorder, riot, and confusion would necessarily also prevail: for it would be quite impossible to exact the observance of different police laws, by the enlisted soldier and the follower of the camp, when both parties are confined to the same limits.

But it must be remembered that the application of such laws to such persons, would not be warranted in time of peace, under the ordinary conditions of camps and garrisons;—and, wherever civil judicature is in force, the followers of the camp, who are accused of crimes punishable by the known laws of the land, must be given up to the civil magistrate.

There are, also, offences of a purely military kind, which may be committed by such persons, such as neglect of orders, or positive disobedience, or insolence to the commander, or to a commissioned officer—offences which are of a description, impossible, having a regard to the example, which such acts would present to the soldiery, to be overlooked,—and such offences could not be punished by a civil court; and yet a court-martial cannot take cognizance of them, as the offender is not properly amenable to its jurisdiction. From such a state of things, many inconveniences and bad consequences have re-

<sup>1</sup> Simmons on Courts Martial, p. 20.

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sulted, and frequently, no doubt, led to the infliction of summary punishments, or to an improper exertion of military authority or law. Under such circumstances the only guarantee of good conduct on the part of such individuals, would seem to be in their personal or pecuniary interests derived from the privileges of their station, and in the power which the commander possesses to prohibit their further intercourse with the troops.

Although it has been said above, that the custom of trying persons unconnected with the army, by courts-martial, which prevails in the field, is dependent upon necessity, it must not be taken to mean that the authority by which a commander acts in such cases, flows directly from that: the necessity now spoken of gave origin to the law by which the rights on one side, and the obligations on the other, were delegated and imposed, and intended to obviate the great inconveniences and dangers which have been adverted to above.

By the 60th article of war it is declared that, "All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

As circumstances often arise which implicate, in a higher or lower degree, the class above named, it may not be without use to characterize, more particularly, the persons referred to as *sutlers, retainers to the camp, and persons serving with the army.*

**Sutlers.**

A *sutler*, which is a term familiar to the army,

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is a person who, under the authority of the military commander, is permitted to reside in or follow the camp with food, liquors, and small articles of military equipment, or others, for general use or consumption. By the general regulations for the army, the mode and authority for the appointment of sutlers are pointed out. It can hardly ever be made a question of any difficulty who is, or who is not, a sutler within the meaning of the law. Without endeavouring to find a very exact and accurate definition of the term, it may be understood in general to mean one who is a seller of provisions or drinks, or other commodities or merchandise whatsoever, and such sense or signification has been attached to it by military courts, and it is sufficiently comprehensive to embrace every trader within the boundaries of the camp.

*A retainer to the camp*, is one who is connected with the military service, or business of the camp, by pay, or fee. Under this head may be reckoned clerks, drivers, guides, and many others, who, at times, are employed in the public service, and maintained at the public expense.

Retainers to the camp.

*Persons serving with the armies*, may be comprehended with the class last described above, but far exceeding it in numbers; as it attaches to all who are bound in private service by wages from individuals who belong to the army, as to those who serve by engagement for public hire or pay. Under this head, therefore, are ranged that numerous body known as servants, and others who derive their compensation from a private source.

Persons serving with the armies.

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These various description of persons, as has been remarked, enjoy certain privileges in consideration of the advantages, convenience, &c., which they offer to the soldiers. They move with the camp, have their stations in it, and are confined in their transactions with the military state; and it is evident, therefore, that their quiet and subordination is intimately and necessarily connected with that of the soldiery.

Necessity of  
subjecting camp  
followers to mil-  
itary regulation  
—their duties,  
privileges, &c.

Mixed as they are in their situation, in their business, and interests with the military body, it becomes necessary that they should be governed by the same laws made common to both; and under no other system could the identity of principle be practicable as the ruling power. *Sutlers* and *camp followers* entering into a new society, having peculiar laws of its own, by their own voluntary act, must conform to those laws, as such is an understood condition of their admission: they are therefore liable to receive the orders of their military superiors, and are to act in conformity thereto, though rather in a civil than in a military capacity. These persons cannot be called upon to perform military duty; but in all that relates to the maintenance of the peace and order of the camp, the observance of rights, public or private, the arrangement of their goods, horses and carriages, and in matters pertaining to the police, safety or convenience of the camp, they are as much liable to military command, and punishment for the non-observance of the same, as the enlisted soldier; though they are not compellable to perform the actual duties of a combatant. It becomes then a matter of importance to these persons that they

should, upon entering into such new relations of life, make themselves acquainted with the orders and regulations by which they are governed ; for it is a principle in military, as well as in civil communities, that ignorance of the law is no excuse for offences.

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Prior to the year 1818, there had been much doubt expressed as to the amenability of cadets of the U. S. Military Academy to military law ; and so strong was the opinion that in the year above mentioned a general court-martial, consisting of officers of rank, experience and high intelligence, declined taking cognizance of charges preferred against certain cadets, on the ground that the court had no legal jurisdiction over such persons. The question was submitted to the proper legal department of the government, and the then attorney general, William Wirt, Esq., having given the subject a full examination, submitted his opinion with an elaborate argument, by which the point has ever since been settled ; and courts-martial have accordingly exercised a full jurisdiction over cadets, as being subject to the rules and articles of war.

Cadets of the military academy subject to the rules and articles of war.

Another question which involves high interests, both of individuals and the government, has been frequently made the subject of conversation by officers of the military service ; and as it is one upon which no precise decision by courts-martial has been established, or at least treated of in any work on military law, the writer deems it proper to enter somewhat minutely into its investigation.

It has been questioned, whether a court-martial can exercise jurisdiction over a person after



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A soldier or seaman may be tried for an offence committed prior to the expiration of his term of service

the expiration of his term of service, for an offence committed while acting in the capacity of a soldier or seaman, prior to such period. The argument urged against such power is principally,—that unless there be some express statutory provision giving the right, the military authority, of every description, ceases necessarily, with the period for which the soldier or seaman had enlisted or engaged to serve in a military capacity; and that if such person be liable at all after the expiration of his term of service, he is liable in *all places*, at *all times*, and to *all officers who have ever commanded him*.

The question is not whether a law giving such authority would not, with proper limitations, be proper and beneficial, but it is urged that as there is no express sanction given by law for the exercise of such jurisdiction, it cannot, therefore, be claimed by inferences and arguments from convenience and expediency. Every man, it is said, who is not bound by military engagements, and the laws which govern those communities, is only subject to trial for any imputed offence by the common law courts of the land; and that courts-martial are divested of all jurisdiction over such persons, and therefore cannot enter into the question of guilt or innocence, and are not the proper tribunals to settle such fact.

Such are the general objections made to the assumption of the authority in question; to which it is replied:—

The general principle of law is, that whenever any act is prohibited under a penalty, and no limitation affixed to a prosecution, the of-

offender is amenable at any time during his life: and were this principle not applicable to military persons, it is evident that offenders would frequently escape punishment, to the great detriment of the public service, because there are no other than courts-martial which can take cognizance of particular crimes. It would also operate much to the prejudice of the public were offenders, in all cases, to be brought to trial at particular periods, within the statute of limitation, if any exist—and thus limit the authority to the mere time of the existence of a particular exigency, when it might be thereby unable to take cognizance of, and decide upon a single offence.

The laws for the government of the army and navy have in every instance, where crimes or offences are specified, or where a general description of them and authority to notice is given, as in the 99th article of war, and the 32nd article for the government of the navy, said, that the same shall be punished as a court-martial shall direct.

Here is authority given to such courts to take cognizance of the class of crimes indicated, and to punish either by the arbitrary declaration of the law, or by the discretion vested in them. If then the time is not limited, by any statute, when their jurisdiction of these offences ceases, it would seem to be putting at too great hazard, the interest, the safety, and the reputation and honor of the military and naval service, to permit offenders to escape all punishment, and thus encourage insubordination and violence, asserting a privilege for the criminal,

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because, he had been prudent enough to restrain his temper, or regulate his conduct until no judicial notice could by possibility be taken of his offences before the expiration of his term of service!

If the object of these laws was intended to enforce obedience, and to promote discipline, and ensure order and safety, there can appear but little ground to doubt the jurisdiction of courts-martial in cases like those now considered. Such object is apparent and admitted, and therefore the amenability of one for the commission of military crime, to the authority of a special tribunal created for the trial and punishment of such offenders, is not to be changed because between the commission of the offence and the time of the assembling of the court, he may have changed his official relations or professional character.

A case, arising in the naval service, in which the principles of the law embraced in the consideration of the question before us, was adjudicated in 1830;—and as it is explanatory of the subject, it is quoted with the opinion of the court.

Case of William  
Walker, sea-  
man.

*“Supreme Judicial Court—Suffolk County,  
Massachusetts, 25th January, 1830.*

WILLIAM WALKER on a writ of *habeas corpus*,  
vs.

CHARLES MORRIS, Esq., commanding naval officer, Boston Station.

By the return on the writ it appeared that the petitioner, *William Walker*, enlisted into the navy of the U. S., on the 5th day of January

1829, for the term of one year; and that on the 3rd day of January 1830, the said *William Walker* being still a seaman in the navy committed the crimes and offences of "disobedience of orders"—"uttering mutinous words"—and "raising a weapon against his superior officer, while in the execution of the duties of his office."—Whereupon he was put in confinement by the respondent, captain Morris, and on the day following, charges were preferred against him to the secretary of the navy, and a court-martial for his trial ordered on the 13th, which court was duly convened.

Upon the return of the writ, the counsel for the petitioner, moved the court that he should be discharged and go without day. This motion was resisted by the counsel for the respondent, and the arguments of either party, which were substantially the same as those given in the foregoing pages, having been heard by the court, the following decision was given.

WILDE, J. "Although I have entertained no doubt respecting the case, yet as it is of great importance to the petitioner, and may materially affect the discipline of the navy, in which the public have so deep an interest, I have thought proper to consult with my brethren, the chief justice and judge Putnam, and we all concur in the opinion which I will now deliver.

*Opinion of Mr.  
Justice Wilde.*

"The motion for the petitioner's discharge from the custody of captain Morris is grounded upon the objections, that neither by the rules for the regulation of the navy, nor by any other statute, is it provided that any seaman should be detained beyond the period of his enlistment

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for any purpose or cause whatever: that however reasonable or convenient it might be that the law should be otherwise under the circumstances of this case, yet unless it is so provided by express statute, his officers have no authority to detain him for trial, or for any other purpose beyond the term of his enlistment; and that such authority is not to be created by implication. If this is the clear construction of the act for the government of the navy, we must be bound by it, whatever may be the consequences, and however injurious they may be to the service of the navy. That such a construction would be highly injurious to the service and discipline of the navy is not, and indeed cannot be denied. For many of the offences created by the act for the better government of the navy are not punishable at common law, and of which no other courts, excepting courts-martials can take cognizance: so that if any of these offences should be committed by any seaman immediately before the expiration of his term of service, he would escape with impunity. He might be guilty of the grossest insults to his officers; of disobedience to orders in the most critical moment of danger to the ship; and in the hour of battle he might refuse to fight, and there would be no power to punish him. Or he might at any time be guilty of desertion, and if he could avoid an arrest during his term of enlistment, he might set the law at defiance. Now it is impossible to believe that a construction of the statute involving such disastrous consequences can be conformable to the meaning and intention of congress: nor do the words of the statute re-

quire such a construction. It is true that a seaman is not bound to do service after the term of his enlistment. But within that term, he is bound to observe the rules and regulations provided by law for the government of the navy, and is punishable for all crimes and offences committed in violation of them during his term of service. There is no limitation of time within which he is to be prosecuted and tried for such offences, but if there were, it would be sufficient to show that the prosecution was commenced within the time of limitation.

"In this case the petitioner was arrested or put in confinement, and charges were preferred against him to the Secretary of the Navy, before the expiration of the time of his enlistment: and this was clearly a sufficient commencement of the prosecution to authorise a court-martial to proceed to trial and sentence—notwithstanding the time of service had expired before the court-martial had been convened. A case somewhat similar has been decided in this court under 'the act making further provision for the punishment of convicts sentenced to hard labor, and the better regulation of the state's prison.' By this act the information is to be filed and the convict brought in for trial or sentence during the time of his imprisonment on his prior conviction. A case occurred in which an information against several convicts was filed, they were thereupon brought in for trial before their term of imprisonment expired. But, before their trial could be had, their term of imprisonment and confinement to hard labor had expired, and it was objected that the court

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venience, and thereby be brought in direct opposition to the purposes for which such individuals are engaged to serve. There can be but little fear that the attainment of the ends for which military tribunals are organized, will fail under the present system, more frequently, than if a greater number of voices were called upon to decide; or at least, that there will be wanting a just appreciation of the duties, and solemnity of the obligations by which they ought to be controlled. To establish a mode of judicial proceeding, which might dissipate all error, and make wilful injustice impossible, is certainly beyond the reach of human capacity; and military, like civil bodies, must equally repose in the same principles and sanctions, to which the understandings and consciences of all men appeal.

The direction given for the number to compose a court, is merely directory of the officer appointing.

This interpretation of the law has, however, been formally and judicially expressed, in an opinion delivered by the late Mr. Justice Story of the supreme court, in the case of *Martin vs. Mott*, reported in 12 Wheaton, 34, 35, and it was then decided, that "the direction contained in the act of 1806, that a general court-martial 'shall not consist of less than thirteen, when that number can be convened without manifest injury to the public service,' is merely directory of the officer appointing the court; and his decision as to whether that number can be convened without manifest injury to the service, being in a matter subjected to his sound discretion, must be conclusive."

To meet the necessities of service, it is provided that officers of the marines, and officers of the land forces shall be associated for the

the reasons already given, unnecessary to decide on this point.

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"In this case there can be no doubt, I think, that the court-martial have jurisdiction, and that they may legally proceed in the trial, on the charges stated in the return. The petitioner must therefore be remanded to the custody of Captain Morris."<sup>1</sup>

Upon this decision the petitioner, *William Walker*, was, by the court-martial, tried upon the charges as specified in the return to the writ.

In reference to the question discussed in the foregoing case, the writer, without entering into the examination of how far the case of Lord George Sackville is to be considered a precedent for the American service, or, in what manner the special tenure of office, growing out of the respective rights, powers, or prerogatives of the president of the United States, and the English sovereign, might affect the liability of a commissioned officer to military trial, would add the expression of his belief that the principles stated, and the decision made by the court to whom the case was submitted, are eminently reasonable and just.

Proceedings must be commenced against the prisoner before the expiration of his term of service.

It must be borne in mind, however, that in all such cases which may occur, the decision quoted goes only to maintain the prosecution, if commenced before the time at which the prisoner is entitled to claim his discharge. If once lawfully discharged the service, he could not afterwards be arrested, or held amenable

<sup>1</sup> This case is reported in the *American Jurist*, April No. of 1830.



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to trial by a military court, for a military offence committed during the period of his military service.

In concluding this chapter, it is proper to remark, that it has been laid down as a maxim, by high legal authority,<sup>1</sup>—that no person impressed with a military character by an act of congress, can be held amenable to the rules and articles of war, “without a positive provision to that effect.”

<sup>1</sup> Mr. Wirt, Opinions, p. 204.

## CHAPTER III.

### OF THE DIFFERENT KINDS AND COMPOSITION OF COURTS MARTIAL.

MILITARY offences or crimes, varying much under the circumstances in which they are committed, as to degree of turpitude, it became necessary, as a matter of convenience to the service, as well as of justice to individuals, to constitute courts-martial of higher and lower powers, for the investigation of all acts which might, in their various shades of criminality, impugn the rules of military discipline.

Courts-martial are therefore defined as either general, regimental, or garrison. The court denominated a general court-martial is of superior attributes, and claims jurisdiction over all acts of a military nature, that may be committed by military persons; and its punitive powers are necessarily co-extensive with this right.

Commissioned officers are not amenable to trial by any other than a general court-martial, and it is provided that they shall not be tried by officers of an inferior rank, if it can be avoided.<sup>1</sup> It is also declared that general courts-martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen, where that number can be convened without manifest injury to the service.<sup>2</sup>

#### CHAPTER III.

The propriety of courts martial having different powers of greater and less jurisdiction.

Commissioned officers cannot be tried except by a general court martial.

<sup>1</sup> 75 Article of War.

<sup>2</sup> 64 Article of War.

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III.

Officers not  
having military  
rank, are ineli-  
gible as mem-  
bers of a court  
martial.

In interpreting the words "*commissioned officers*," as applicable to persons eligible as members of a general court-martial, it has been the custom of service to exclude from that class, all surgeons, assistant-surgeons, and paymasters, and indeed every one who is not clothed with military rank proper, and having thereby an inherent right of command. This is thought to be in strict consonance with the purposes intended by law, and can, in no respect, derogate from the rights of such persons, or put in jeopardy any of their interests. It would certainly seem somewhat anomalous to institute a court for the trial of military offences, and appoint as judges, persons who, from their duties connected with the army, from their previous pursuits and education, and the manner in which they are introduced into the service, can have but a very limited knowledge, and doubtful views of military conduct. This objection, it is true, may, in some degree, and for a limited time, be also urged against the junior subalterns of the army; but it must also be remembered that such condition is of necessity, growing out of the order of military life, and is but of temporary duration in each particular case. In opposition to the practice obtaining, it has been urged by that class of officers who are excluded from sitting as members of general courts-martial, that the operation of the rule is partial and unequal, and that it appears unjust that they, as members of the military body, should be made obnoxious to the authority of a military court, while, at the same time, they are denied the privilege of ever being considered as of its component elements. Now

this objection has but little weight if fully considered. The purpose intended by the creation of military courts, was for the regulation of the conduct of military persons, founded in policy for the public good, and having no reference to official gratification, or pretension, and totally irrespective of persons. If the questions to be decided before those courts in the cases of such persons, were purely of a professional or personal nature, the interests involved would be different from what they now are, and might authorise another view of proceeding; but such is not the case; and matters touching discipline, being the object for judgment, it should rather be considered as an advantage than as a prejudice to them, that military courts are constituted as they are at present.

The substance of the objection, if endued with any validity in their case, as the principles of justice are general and uniform, would equally apply to the great mass of the community, and particularly to the rank and file of the army; and society would present a very remarkable state, in which it was found necessary to sanction a proceeding, or acknowledge a principle, which was daily inflicting a wrong upon every member of it.

But, if it is true, that questions pertaining to the particular profession, or business of that class of officers, are never, except so far as they are subject to some clearly defined rule of the regulations, made the subject for inquiry and judgment by courts-martial, it is quite different in the case of regimental or staff officers, whose duties require them to command or act with troops.

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Here technical knowledge and opinions are required, which can only be possessed, and with propriety expressed by the same class of persons, and constitute, as has been exemplified in many instances, the whole means of investigation and decision. If therefore, another body of men, not clothed with such attributes for judgment, were called upon to exercise such functions, the public interests, as well as individual reputation would be endangered; and it would be no sufficient answer to say, that in such cases they should not, or would not be detailed as members of a court-martial; because it can be affirmed with more certainty, that if they are considered, under the law, eligible to such a duty, in any one case, so are they equally eligible for the like duty in every other case, which may arise.

The rule which has been adopted, and for a long time received the sanction of the army, should be continued, as it seems founded in propriety and the true principle of administrative justice. While on the one hand it abridges no rights, nor puts at hazard any interests, so on the other, it assures safety to reputation as well as to person; gives confidence in the pursuit and execution of professional objects and duties, and satisfies the great body of the military profession that praise or censure, will be meted out under the observance of a consistent and necessary military rule.

This question however has been decided some years ago, upon the same principles which are set forth above, and the rule seems so consistent with a right reason, that it should not

again be permitted to be disturbed by a contrary practice.

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The very question now under discussion, arose in the progress of a prosecution in the naval service, and was referred to the Hon. John McPherson Berrien, Attorney General, for his opinion thereon, which under date of November 6, 1829, was thus stated :—

“As to the right of chaplains, surgeons, &c. ; or non-combatants, to sit on courts-martial,—if we look to the origin of courts-martial in England (from whence we borrow them) it would be difficult to believe that a tribunal, which has succeeded there to the ancient court of chivalry, could be composed of others than military men. And if we consider the nature of the subjects, which are generally submitted to the decision of these tribunals, the knowledge of military discipline and usage, and frequently of tactics, (which is indispensable to those who preside there) it would seem that non-combatants, whose duties do not lead them to acquire this species of information, and who have no rank, either real or assimilated, could not be deemed competent to sit on courts-martial.”<sup>1</sup>

Opinion of attorney general.

There is such an evident propriety in the reasons set forth in the above cited opinion, that the writer cannot hesitate to adopt, and lay down the rule in accordance therewith.

There was at one period a question raised, whether a cadet, *breveted to a lieutenancy*, was a *commissioned* officer, and as such eligible to sit as a member of a court-martial. It was determined by an opinion of the attorney general in

<sup>1</sup> Opinions, p. 737.

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August, 1829,<sup>1</sup> that such person was not a commissioned officer within the meaning of the sixty fourth (64th) article of war, and therefore could not be a member of a court-martial.

A cadet, breveted to a lieutenancy is eligible to sit as a member of a court martial.

This opinion was never fully acceded to, and if allowed a practical operation would frequently stand as a hindrance to the ordinary course of service. The doubts which were entertained upon this subject have varied from time to time, but latterly have been definitively settled by general orders no. 11, April 15, 1845, under the authority of the war department,—which declares, that a cadet or “graduate, so commissioned and attached, becomes an officer of the lowest grade in the corps, and is entitled to all consideration as a commissioned officer.”

The appointing power has the discretion to determine the number of members.

The number of officers necessary for the composition of a general court-martial is specified by the 64th article of war; but in determining that number, the officer empowered to appoint the same is invested with a discretionary authority; and the like discretion is given to fix the hours of session of the court, or for the proceedings or trial, and the rank of the officers relative to that of the accused, of which it is composed.

It has frequently been complained, that the number, and rank of the members of a general court-martial in particular cases, did not reach the highest limit contemplated by the law; and officers, at times, for such causes, have been ready to question the propriety or legality of the act of him who appointed the court. They who have thus thought, have drawn their con-

<sup>1</sup> Opinions, p. 709.

clusions from facts within their own observation, and applied them to what they conceived the state of the service would permit. But in so doing, it does not appear to have occurred to them that they were assuming a discretion to judge of the proceedings of a superior, not belonging to their position. The doctrine of the exercise of a discretionary power is plain and simple. He who is clothed with such authority, is made thereby the judge of circumstances which may control its operation, and if it be used in good faith, without fraudulent or corrupt intentions, its exercise is sufficiently legal. The question of opinion, as to the state of the service, which may or may not permit the detail of a greater number than that fixed for the court, is not to be brought into controversy. Such opinion may, it is true, be a mistaken one, but if it be an honest expression of belief, that is all the law requires. To impugn then the act of the appointing power, it must be shown, not by the accidental result of a trial, or the preponderance of opinion, but by clear and indisputable evidence, that such act was not only mistaken, or erroneous as to fact, but wilfully corrupt in purpose. In the varied circumstances in which an army operates, and the numberless sudden and unforeseen contingencies, which affect military service, must be sought the reasons which induced such a trust to military commanders. If a rule were to be established for the administration of military justice, so fixed as never to bend or yield to the necessities of the service, it would but be making a great public interest subservient to mere individual con-

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venience, and thereby be brought in direct opposition to the purposes for which such individuals are engaged to serve. There can be but little fear that the attainment of the ends for which military tribunals are organized, will fail under the present system, more frequently, than if a greater number of voices were called upon to decide; or at least, that there will be wanting a just appreciation of the duties, and solemnity of the obligations by which they ought to be controlled. To establish a mode of judicial proceeding, which might dissipate all error, and make wilful injustice impossible, is certainly beyond the reach of human capacity; and military, like civil bodies, must equally repose in the same principles and sanctions, to which the understandings and consciences of all men appeal.

The direction given for the number to compose a court, is merely directory of the officer appointing.

This interpretation of the law has, however, been formally and judicially expressed, in an opinion delivered by the late Mr. Justice Story of the supreme court, in the case of *Martin vs. Mott*, reported in 12 Wheaton, 34, 35, and it was then decided, that "the direction contained in the act of 1806, that a general court-martial 'shall not consist of less than thirteen, when that number can be convened without manifest injury to the public service,' is merely directory of the officer appointing the court; and his decision as to whether that number can be convened without manifest injury to the service, being in a matter subjected to his sound discretion, must be conclusive."

To meet the necessities of service, it is provided that officers of the marines, and officers of the land forces shall be associated for the

purpose of holding courts-martial, and in such cases, the orders of the senior officer of either corps, who may be present and duly authorised, shall be received and obeyed.<sup>1</sup> But whenever the officers and soldiers of any troops, militia or others, are duly mustered and in pay of the United States, and serving in conjunction with the regular forces, the officers of these different forces cannot be associated for the trial of an officer or soldier of the militia. In such cases the court-martial must be composed entirely of officers of the militia.<sup>2</sup> It would appear but just that the rule should be reciprocal;—for, if the militia are not to be subjected to the judgment of officers of the regular service, it is very inconsistent to measure the opinions and acts of the latter by the judgment of the former. The reason of the law would, undoubtedly, exclude militia officers from a court convened for the trial of persons belonging to the regular service.

It was formerly the practice, in detailing the members of a general court-martial, to name one as the president thereof, who, necessarily, was considered as occupying a position somewhat differing from that of the body of the court. The laws which authorise the assembling of courts-martial, making no provision for such special authority, and neither requiring nor authorising, such appointment, the custom fell into disuse, and is, at present, no longer observed. Independent, however, of the want of legal necessity for such a rule, there were many inconveniences connected with it, which, in a

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Officers of the marines may be associated with officers of the land forces, as members of courts martial.

Militia when in the service of the U. S. have courts martial composed of militia officers.

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<sup>1</sup> 68th Article of War.

<sup>2</sup> 97th Article of War.

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to trial by a military court, for a military offence committed during the period of his military service.

In concluding this chapter, it is proper to remark, that it has been laid down as a maxim, by high legal authority,<sup>1</sup>—that no person impressed with a military character by an act of congress, can be held amenable to the rules and articles of war, “without a positive provision to that effect.”

<sup>1</sup> Mr. Wirt, *Opinions*, p. 204.

## CHAPTER III.

### OF THE DIFFERENT KINDS AND COMPOSITION OF COURTS MARTIAL.

MILITARY offences or crimes, varying much under the circumstances in which they are committed, as to degree of turpitude, it became necessary, as a matter of convenience to the service, as well as of justice to individuals, to constitute courts-martial of higher and lower powers, for the investigation of all acts which might, in their various shades of criminality, impugn the rules of military discipline.

Courts-martial are therefore defined as either general, regimental, or garrison. The court denominated a general court-martial is of superior attributes, and claims jurisdiction over all acts of a military nature, that may be committed by military persons; and its punitive powers are necessarily co-extensive with this right.

Commissioned officers are not amenable to trial by any other than a general court-martial, and it is provided that they shall not be tried by officers of an inferior rank, if it can be avoided.<sup>1</sup> It is also declared that general courts-martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen, where that number can be convened without manifest injury to the service.<sup>2</sup>

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The propriety of courts martial having different powers of greater and less jurisdiction.

Commissioned officers cannot be tried except by a general court martial.

<sup>1</sup> 75 Article of War.

<sup>2</sup> 64 Article of War.

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Officers not  
having military  
rank, are ineli-  
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The substance of the objection, if endued with any validity in their case, as the principles of justice are general and uniform, would equally apply to the great mass of the community, and particularly to the rank and file of the army; and society would present a very remarkable state, in which it was found necessary to sanction a proceeding, or acknowledge a principle, which was daily inflicting a wrong upon every member of it.

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The rule which has been adopted, and for a long time received the sanction of the army, should be continued, as it seems founded in propriety and the true principle of administrative justice. While on the one hand it abridges no rights, nor puts at hazard any interests, so on the other, it assures safety to reputation as well as to person; gives confidence in the pursuit and execution of professional objects and duties, and satisfies the great body of the military profession that praise or censure, will be meted out under the observance of a consistent and necessary military rule.

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<sup>1</sup> Opinions, p. 737.



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General courts  
martial can take  
cognizance of  
any military of-  
fence.

itary crime are known, and the knowledge of them can be, if properly referred to, a safe means to indicate the character of the tribunal before which it should be tried.

Of offences  
made triable by  
regimental  
courts, a gene-  
ral court mar-  
tial can try also.

The general description of offences, as referable to the authority of the several courts-martial, is sufficiently distinct to enable those bodies in most cases to avoid interference by the acts of the one, with the exclusive rights of the other. It has been followed as a custom, and acknowledged as a principle, that while the inferior court cannot, upon any pretence, proceed in the investigation of any description of offence which has not been explicitly stated as subject to its authority, yet the superior court, can, by virtue of its grade, necessarily take cognizance of all military offences whatever;<sup>1</sup> and that upon the plea that what can be done by a court whose authority and functions are limited, can of course be done by another court, whose powers are not thus circumscribed. There are offences, indicated in the articles of war, expressly made the subject of action for a regimental court;<sup>2</sup> and thence has arisen the question, whether, as the law has given such court a special right in such cases, any other court can exercise authority over them.

Now the question must be, it is apprehended, determined by the character of the statute, and the object for which the offences are declared punishable. The statute being penal, is necessarily to be construed strictly, so far as the degree of punishment may affect the offender; but the

<sup>1</sup> Adye on Courts Martial, p. 96.

<sup>2</sup> 37th and 47th Articles of War.

clusions from facts within their own observation, and applied them to what they conceived the state of the service would permit. But in so doing, it does not appear to have occurred to them that they were assuming a discretion to judge of the proceedings of a superior, not belonging to their position. The doctrine of the exercise of a discretionary power is plain and simple. He who is clothed with such authority, is made thereby the judge of circumstances which may control its operation, and if it be used in good faith, without fraudulent or corrupt intentions, its exercise is sufficiently legal. The question of opinion, as to the state of the service, which may or may not permit the detail of a greater number than that fixed for the court, is not to be brought into controversy. Such opinion may, it is true, be a mistaken one, but if it be an honest expression of belief, that is all the law requires. To impugn then the act of the appointing power, it must be shown, not by the accidental result of a trial, or the preponderance of opinion, but by clear and indisputable evidence, that such act was not only mistaken, or erroneous as to fact, but wilfully corrupt in purpose. In the varied circumstances in which an army operates, and the numberless sudden and unforeseen contingencies, which affect military service, must be sought the reasons which induced such a trust to military commanders. If a rule were to be established for the administration of military justice, so fixed as never to bend or yield to the necessities of the service, it would but be making a great public interest subservient to mere individual con-

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V.

Of specific punishments.

The articles of war have for many kinds of offences designated specific punishments. In such cases there is no discretion left with the court in awarding sentence, but there may be occasion to take notice of favorable circumstances which have been shown in the course of trial, and which, as palliative of the crime, may induce a recommendation to mercy. This part of the subject will be further considered in a succeeding chapter.

Capital punishment only in cases expressly stated by the law.

General courts-martial, as has been previously stated, are clothed with the highest powers pertaining to a military judicial body, and may award in some cases, the *ultimum supplicium*, of death, and in others the lightest infliction, of fine or imprisonment. It must be observed however, that capital punishment cannot be inflicted by the sentence of a court-martial, except in such cases, as have been, for specified crimes, made expressly obnoxious to such judgment. The degrees of punishment are various, ranging from the highest that human authority has deemed necessary for the security of social intercourse, to the lowest that the particular interest of a small community may require for the maintenance of good order. These degrees are not, as they could not be, determined for every case, but are necessarily left for the discretion of the courts, to apply according to the attendant circumstances. The punishment of death, which is denounced against the crime of desertion, is by the act of congress, of May 29, 1830, expressly restricted, by declaring that "no officer or soldier in the army of the United States shall be subject" to the same, "for desertion in time of

No deserter can be capitally punished in time of peace.

purpose of holding courts-martial, and in such cases, the orders of the senior officer of either corps, who may be present and duly authorised, shall be received and obeyed.<sup>1</sup> But whenever the officers and soldiers of any troops, militia or others, are duly mustered and in pay of the United States, and serving in conjunction with the regular forces, the officers of these different forces cannot be associated for the trial of an officer or soldier of the militia. In such cases the court-martial must be composed entirely of officers of the militia.<sup>2</sup> It would appear but just that the rule should be reciprocal;—for, if the militia are not to be subjected to the judgment of officers of the regular service, it is very inconsistent to measure the opinions and acts of the latter by the judgment of the former. The reason of the law would, undoubtedly, exclude militia officers from a court convened for the trial of persons belonging to the regular service.

It was formerly the practice, in detailing the members of a general court-martial, to name one as the president thereof, who, necessarily, was considered as occupying a position somewhat differing from that of the body of the court. The laws which authorise the assembling of courts-martial, making no provision for such special authority, and neither requiring nor authorising such appointment, the custom fell into disuse, and is, at present, no longer observed. Independent, however, of the want of legal necessity for such a rule, there were many inconveniences connected with it, which, in a

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<sup>2</sup> 97th Article of War.

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service like that of the United States, where bodies of troops are scattered over a wide country in small detachments, made it very desirable to be laid aside. In case of challenge to the president, it became necessary to refer to the head quarters, by whose authority the court was constituted, in order that his place might be supplied, or a new detail made; and equally incapacitated was the court to proceed with its business, should the same person be absent, at the time when the court was directed to assemble. These were weighty considerations, affecting the employment of officers, the condition of the accused, and consequent expense to the government, which have introduced a better and a more simple rule. At present, therefore, when the number to form the court is specifically expressed, between five and thirteen, the court is fully competent to proceed, so long as it does not fall below the minimum indicated, and the senior member present, by virtue of his rank, is the president of the court.<sup>1</sup>

A court martial is competent to proceed, so long as it does not fall below the minimum named in the order.

Any commissioned officer, having military rank, without regard to degree or grade, is eligible to sit on courts martial.

There is no limitation as to degree of rank necessary to be held by officers, in order to make them eligible to sit as members of any description of courts-martial. "General courts-martial," it is said, "may consist of any number of commissioned officers, from five to thirteen inclusively."<sup>2</sup> The rank, therefore, of the individual member is considered only in relation to that of the accused, and to the importance

<sup>1</sup> Such is the practice of the navy, under the 35th and 39th articles for its government.

<sup>2</sup> 64th Article of War.

of the subject matter of investigation, according to the discretion of the appointing power.<sup>1</sup>

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The proceedings and decisions of general courts-martial are subject to review or revision by the officer ordering the same, or the officer commanding the troops for the time being: and no sentence of a general court-martial in time of peace, extending to the loss of life, or the dismissal of a commissioned officer; or which shall, either in time of peace or war, respect a general officer, can be carried into execution, until after the whole proceedings shall have been transmitted to the secretary of war, to be laid before the president of the United States for his confirmation or disapproval, and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be.<sup>2</sup>

Proceedings  
subject to re-  
view.

The directions given for the course of procedure are very explicit, to guard against the abuse of authority, or prejudiced and hasty action. And in matters touching the life or commission of the accused, an additional check, in time of peace, is provided, in order that the whole subject may be fully and dispassionately considered. And every officer authorised to order a general court-martial shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death, or of cashiering an officer; which, in the cases where he has authority (by article 65,) to carry

Power to pardon or mitigate punishment, or suspend the execution.

<sup>1</sup> 75th Article of War, and 35th Article of Regulations for the Navy.

<sup>2</sup> 65th Article of War.

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them into execution, he may suspend until the pleasure of the president of the United States can be known; which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the president for his determination.<sup>1</sup>

For the cognizance and punishment of military offences of minor degree, there are the regimental, and the garrison courts-martial. The regimental court-martial may be ordered or appointed by the commander of a regiment or corps, for his own regiment or corps, to consist of three commissioned officers.—And the commander of any of the garrisons, forts, barracks, or other places, where the troops consist of different corps, may assemble courts-martial to consist of three commissioned officers, and decide upon their sentences.<sup>2</sup>

The term descriptive of these courts, evidently is applied, as the court is assembled by the order of a commander of a regiment, or corps, or by that of the commander of a garrison. The proceedings in these courts are to be submitted to the officers ordering the same, or to their successors in command, for revision, and decision on the sentences pronounced. And the colonel, or commanding officer of the regiment or garrison, where any regimental or garrison court-martial shall be held, may pardon or mitigate any punishment ordered by such court to be inflicted.<sup>3</sup> The jurisdiction of these courts is very limited, and can in no case extend to the trial of capital cases, or commissioned officers.<sup>4</sup> Neither can they inflict a fine ex-

<sup>1</sup> 89th Art. of War.    <sup>2</sup> 66th Ibid.    <sup>3</sup> 89th Ibid.    <sup>4</sup> 67th Ibid.

ceeding one month's pay, or imprison, or put to hard labor any non-commissioned officer, or soldier, for a longer time than one month.<sup>1</sup>

It is apparent that great convenience and benefit to the service is consequent to the institution of these minor courts. There are frequent occasions for inquiry into alleged misconduct on the part of soldiers, when it would not be possible to assemble the number required for a general court-martial; and to postpone trial would merely be insuring to the delinquent the certain means of escape from punishment. On detached service, or marches, and the like, such courts offer the means of satisfying justice, by an investigation on the spot where the offence has been committed, or the accusation made. On marches particularly, where the men are much more given to trespass upon the property of citizens, than when fixed in the regular duties of a permanent station, it is very desirable that the complaint of the citizen should at once be examined into, that justice may be done to both parties, without delay to the injured, or hindrance, and accumulated expense to the service.

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Regimental and garrison courts martial limited as to punishment. The appointing officer may pardon or mitigate the punishment ordered by such courts.

<sup>1</sup> In law, the division of time called a month, is understood to mean a lunar month of 28 days, unless specified to the contrary as a calendar month.



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The inferior  
courts-martial  
cannot impose a  
fine exceeding  
one month's  
pay.

the weekly stoppage, it did not affect the competency of the court to act, whether the sum total was above or below the value of a month's pay ; or whether the time required to realize the amount was of a longer or shorter period.

But it is thought that the grounds assumed in such reasoning for the support of jurisdiction in the inferior courts, are hardly sufficient to warrant the cognizance by them of such offences. The express declarations of the law, cannot be put aside in order to make way for an interpretation which is repugnant to them. By the 67th article of war it is explicitly stated that no regimental or garrison court-martial shall inflict a fine exceeding one month's pay. Nothing surely could be clearer or more positive, and it is equally certain that the offences indicated in the 38th article of war, will, when perpetrated, most probably produce a loss, more than equivalent in value to one month's pay. The offence then, considering the importance of the articles enumerated, as equipments for military service, and without which, the soldier would rather be an incumbrance, is too grave in its character to be submitted to the limited authority of the inferior court, for investigation and punishment. The only means to resort to for the repairing of such loss or damage is the offender's pay ; but such may be very inadequate for such a purpose, and can in many cases be but a nominal reparation of the injury, on account of the limited time for which soldiers are engaged to serve—it therefore would seem necessary to remit such cases for the action of a general court-martial, in order that a degree of punishment may be inflicted,

which shall at least, have the tendency to deter others from like acts, by the force of example. This offence when noticed must be viewed in reference to the article of war as a specific offence, and cannot, in order to remove it, by an ambiguous method of specifying the crime, for the action of a regimental or garrison court-martial, be classed with numerous other offences, under the denomination of disorders and neglects, to the prejudice of good order and military discipline.

The authority given to regimental and garrison courts-martial to take cognizance of military offences, is distinctly limited by the 67th article of war; and a special power is confided to a regimental court by the 35th article to investigate complaints of soldiers against their captains, or other officers commanding the company to which the complainant belongs. Thus the distinctive character of offences is made plain enough in ordinary cases, to obviate objections on the score of legal jurisdiction, and courts-martial may, without embarrassment or danger, determine their competency to act, upon any military crime which may be made the subject of trial.

From the preceding references to the articles of war, and by the remarks made in connection therewith, it is seen that all military offences, as to the manner, and by what description of court-martial they are to be recognized, may be classed as follows:—Of crimes cognizable by a general court-martial.

*First.* Those which are expressly committed to the jurisdiction of a general court-martial.

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## IV.

Offences specified in the 38th art. of war to be tried by general courts-martial.

Authority of regimental and garrison courts-martial, by the 67th and 35th articles of war.

Crimes or offences proper for trial by a general court-martial.

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*Second.* Those against which particular penalties are denounced, exceeding the authority which regimental or garrison courts-martial have to inflict.

*Third.* Those which, from the nature and circumstances of the offence, seem to demand a severe punishment, beyond the authority of a minor court to order.

*Fourth.* Those which offend against the principles of good order and military discipline, though subject to be tried before a regimental or garrison court-martial, may require, for speedy punishment and convenience to the service, to be investigated by a general court-martial.

Crimes or offences cognizable by a regimental or garrison court-martial.

The crimes cognizable by a regimental or garrison court-martial, comprise all those which infract the ordinary proprieties of military service, as irregularities and disorders which are not of a grave and serious description; besides such specific offences as are named in the articles of war, subject to their authority. Hence, as a general rule, it appears that courts-martial have a jurisdiction in military matters, determined by persons, offences, and punishment denounced; and their authority is necessarily limited by the just observance of such characteristics.

As a means of easy reference, and in order to make more intelligible the distinctions dwelt upon, the following offences are those declared by law cognizable by a general court-martial, and cannot therefore be tried by any other description of court-martial:

Crimes, within the exclusive jurisdiction of general courts-martial.

Art. 7. Beginning, exciting, causing, or joining in any mutiny.

8. Knowing of, and not giving information of, intended mutiny, or not endeavoring to suppress the same.

9. Striking, or drawing or lifting up any weapon, or offering violence to a superior officer in the execution of his duty.

21. Deserting the service.

22. Enlisting in any other regiment, troop or company before being regularly discharged.

23. Persuading to desert.

27. Disobedience of an order, or drawing sword upon an inferior officer, in case of quarrels, frays, &c.

38. Selling, losing, or spoiling, through neglect, horse, arms, accoutrements.

46. Sentinel sleeping upon post.

51. Offering violence to persons bringing provisions or necessaries to camp, out of the United States.

52. Misbehaving before the enemy, abandoning post, throwing away arms, quitting colors to plunder and pillage.

53. Making known the watch-word to any not entitled to receive it, or giving a different parole or watch-word from that received.

55. Forcing a safe-guard in foreign parts.

56. Relieving the enemy, or harboring and protecting an enemy.

57. Holding correspondence with, or giving intelligence to, the enemy.

59. Compelling a commander to surrender.

Sec. 2. Persons not citizens of, or owing allegiance to the United States in time of war, who are found lurking as spies in or about fortifications or encampments of the United States.

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And, in all other cases whatever, in which an officer is to be tried.

All such cases, as have been referred to, coming under the 38th and 45th articles of war, and any other of similar description, should, not only for uniformity of rule, but for the purposes of substantial justice, be made the subject of trial by a general court-martial. To the author, such appears to be the intention of the legislature, for the reasons given in another page, and he would now recommend a like consideration of it to the commanders who possess the authority to appoint courts-martial, and to the members of such courts themselves.

General courts-martial in particular cases, not to award a greater punishment than the inferior courts can adjudge.

There is another observation to be made in this place, which is important to the proceedings of courts-martial. From the principle, previously adverted to, and which has been sanctioned by the custom of the army, and conceded by the service, that general courts-martial may claim and exercise jurisdiction over every species of offence designated by the articles of war, it becomes necessary that such courts should discriminate between crimes confined exclusively to their cognizance, and such others as might be tried by an inferior court, so far as their own discretion to award punishment may be affected. Now in those cases arising under the provisions of the 37th and 47th articles, and by which a jurisdiction is saved to the regimental court, it would appear as a just interpretation of the law, that punishment for such was intended to be limited according to the competency of a regimental court-martial to award it, and, therefore, a general court-martial, when

considering such cases, should not vary in kind, or exceed in degree, the punishment which the inferior court could decree. This rule is not only just in the abstract, but considering the trial as a criminal proceeding, for the infliction of punishment, it is of legal obligation to be followed. And, as a general remark, it may be said, that in whatever case a general court-martial takes cognizance of matter which a regimental or garrison court-martial is competent to try, no severer punishment should be inflicted than what such courts might have also sanctioned. Of course, the particular evidence adduced before general courts-martial in such cases, will enable the members to judge conclusively whether it would have been a fitting subject for an inferior court to try, and the sentence will be accordingly determined. Now, considerations of this kind in the apportionment of punishments, to be borne by military offenders, will have a two-fold good effect:—first, it will satisfy the soldiery who are obnoxious to trial, that it will not, on account of the greater dignity or wider scope of authority of the court, cause a proportionate increase of punishment, and, therefore, appear to be regulated by no consistent or rational principle, when compared with the amount which, for the same offence, a regimental court-martial could inflict:—and secondly, it will tend to harmonize the judgments of the different courts, establish uniformity or precision in their sentences, and make less probable, arbitrary and capricious decisions. The species, at least, of the punishments to be inflicted will, by such a course, become more de-

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terminate, and the quantity or degree, not varying so widely as under the usual custom, will become more equitable. It has been objected to trials by court-martial, and with some appearance of reason, that there is too great variance between the judgments pronounced against the same offences. To those persons who have considered the subject, it must have appeared, from the necessity under which all military courts labor in the manner in which they are constituted, sometimes composed of experienced and able members, and again of a different description of persons, besides the particular circumstances which are presented, and by which the discretion of the court is regulated, that such must be a result, though it is believed, that, greatly as decisions vary, in instances which to the world might appear identical, there is not so great a departure from "equal justice" as is supposed. It is, however, an undoubted fact, that there have been instances in which the discretion to punish has "o'erleapt itself and fallen on the other side," and, therefore, the above remarks are suggested to prevent, by inducing a uniform principle of action, such excess. Regularity and uniformity of procedure are of vital importance for the direction of all courts of justice. Equality in punishment renders punishment for offences more certain, as it satisfies the natural love of justice inherent in the human mind. To attain such result, it is an essential, as it is "one of the glories of the law," that the *species*, though not always the quantity of punishment is ascertained for every offence:—and, as has been said by Sir William

Blackstone,<sup>1</sup>—"it is not left in the breast of any judge, nor even of a jury, to alter that judgment which the law has beforehand ordained, for every subject alike, without respect of persons. For if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so, on the other, it stifles all hopes of impunity or mitigation, with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law; which ought to be the unvaried rule, as it is the inflexible judge, of his actions."

<sup>1</sup> IV. Book, 376.



## CHAPTER V.

### OF PUNISHMENTS.

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Punishment  
regulated in  
kind and de-  
gree by the  
constitution.

Cruel and un-  
usual punish-  
ments.

PUNISHMENTS of every description, which may be inflicted by sentence of either civil or military court, are regulated in kind and degree, by the restraining provision of the eighth article of the amendments to the constitution, which declares, that "excessive fines shall not be imposed, nor cruel and unusual punishments inflicted." Cruel punishments may be defined as those which are vindictive in their character and intended solely to cause suffering, without considering the just relations between the act which offends, and the true purposes for which punishment is inflicted. Or they are such as violate the dictates, or sentiments of natural mercy, without regarding the ends of punishment, as a means only, to ensure the safety of the community. Unusual punishments are, such as the term implies—unknown to the statutes of the land, or unsanctioned by the customs of the courts. Such are the kind forbidden by the fundamental law of the country, and such would, if indulged, be necessarily, arbitrary and capricious. There is of necessity, a wide scope left for the exercise of opinion or discretion to military courts, in the apportionment of punishment to many offences, and this arises from the great variety of circumstances, which are an aggrava-

tion or otherwise of the crime. This may also appear as an exception to the principle heretofore stated;<sup>1</sup> but though the exact amount is not determined, yet the kind of punishment is indicated, and by that must the courts be governed. So would a sentence, which should impose a punishment, excessive in degree, although of an authorized kind, be considered as cruel, because it would be a departure from justice, and violate those rights, personal, and social, which it is the business and duty of courts to defend and protect.

The principle then for the guidance of a court-martial, in determining the *kind* and *quantum* of punishment for any offence, seems to be very clearly pointed out. The express declaration of the law, which for some crimes specifies the penalty, and in other cases the discretion of the court, governed or directed by the customs of war, and a just humanity, are a sufficient safeguard for the conduct of military courts in this particular; and it is a part of their duties which demands their deliberation. The violation of these rules, would undoubtedly subject the members of a court-martial to a civil action on the part of the person whose rights had been infringed by their judgment, and would moreover have a tendency to render unstable the government which such bodies exercise over the military community. To every officer therefore, who is liable to be placed as a member of a court martial, to vindicate the rights of the service by a judicial award of punishment, it must appear a matter of important bearing upon the

Principle by  
which punish-  
ment is regula-  
ted.

<sup>1</sup> Chap. IV. p. 66.

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community to which he belongs, how he shall exercise that judgment which in a judicial capacity he is called upon to exert. It is not only to be regarded as to the effect upon the offender, who may be obliged to suffer a greater or less degree of corporeal pain, and thus satisfy the law, but a careful consideration of his legal powers, and the proper application of them to the particular case before him, in order that no wrong be committed, is also required. This power of discrimination, by which the members of courts-martial are enabled to distinguish the path before them, is not intuitively derived. A habit of reflection, and study of the laws by which they are governed, can alone place it within their reach, and thus save them from the expression of inconsistent opinions, or the commission of illegal acts, which react upon the individual, and the profession, by the significant means, either of ridicule or of retaliation.

## CHAPTER VI.

### PRELIMINARIES TO TRIAL.

UNIFORMITY of procedure against officers and soldiers, for crimes committed by either, is so essential to the harmony of the service, and the personal liberty of all subjected to the rule of military law, that great attention should be given to the forms which the law and the regulations have prescribed. To leave such matters to be regulated or determined by the will of individuals, would necessarily, in many cases, be productive of violent and unbecoming behavior, prejudicial alike to the station or authority of the officer commanding, and to the interests of the military service, for the preservation of which such will had been exerted.

To obviate these difficulties the law has wisely directed the manner in which an offender is to be proceeded against, and declares that "whenever any officer shall be charged with a crime, he shall be arrested and confined in his barracks, quarters, or tent, and deprived of his sword by the commanding officer;"<sup>1</sup> and that "non-commissioned officers and soldiers, charged with crimes, shall be confined until tried by a court-martial, or released by proper authority."<sup>2</sup>

To guard against abuses, which might follow from the imposition of arbitrary arrest and con-

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Necessity of  
uniformity of  
procedure.

Manner of im-  
posing military  
arrest.

Confinement  
not to exceed  
eight days, or  
until a court  
martial can be  
assembled.

<sup>1</sup> 77th Article of War.

<sup>2</sup> 78th Article of War.

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Officer of the  
guard or provost  
marshal to re-  
ceive prisoners.

finement, it is provided, that "no officer or soldier who shall be put in arrest, shall continue in confinement more than eight days, or until such time as a court-martial can be assembled."<sup>1</sup> It is also said that "no officer commanding a guard, or provost-marshal, shall refuse to receive, or keep a prisoner committed to his charge by an officer belonging to the forces of the United States; provided, the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged;"<sup>2</sup> nor shall an "officer commanding a guard, or provost-marshal, presume to release any person committed to his charge, without proper authority for so doing."<sup>3</sup>

The general regulations have established the rule, that "all prisoners under guard, without written charges, shall be released by the officer of the day at guard-mounting, unless orders to the contrary should be given by the commanding officer;"<sup>4</sup> and by the same authority, a commanding officer is empowered, upon application of the prisoner, to allow larger limits to an officer in arrest, than those pointed out in the articles of war.<sup>5</sup>

Prisoner may be  
released, at the  
discretion of the  
commanding of-  
ficer.

But it must be observed, that it does not follow as a consequence, that because soldiers may not be kept in confinement for a longer period than eight days, that they cannot, therefore, be released sooner without trial. The discretion of a commanding officer may justly be exercised in such questions, and greatly for the furtherance

<sup>1</sup> 79th Art. of War.

<sup>2</sup> 80th Ibid. : for the Navy, see 38th Art., p. 63, Naval Laws.

<sup>3</sup> 81st Art. of War.    <sup>4</sup> 212th Par.    <sup>5</sup> 207th Par. G. R.

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of discipline. Such an act on his part may be true leniency towards a prisoner, and operate in a most beneficial manner upon his character and future behavior. By inducing reflection, in the mind of the prisoner, a happy reformation may be brought about; and, indeed, so far from being enjoined against such a course, the article of war appears to provide for such cases, by permitting a soldier to be confined, at the discretion of the commanding officer, for the space of *eight days*.

The 80th article of war, which provides for the reception of a prisoner by an officer commanding a guard, and the making of a written statement of the crime with which the prisoner is charged, would seem to admit, on the part of the first named person, the right to reject a prisoner, unless such a written statement was made. There is an essential difference, certainly, in the language of the article of war existing for the government of the British army, and that of our own, by the introduction in the latter of the word *provided*. It seems to be the better opinion, that in the English army, an officer of the guard, or a provost-marshal, would not be justifiable in rejecting a prisoner, because *the crime*, as it is termed, was not given in, and that on the ground or principle, that the officer committing might have sufficient reasons to extenuate or excuse the omission of such duty; or that the presence of a committing officer might be required immediately elsewhere, and for purposes admitting of no delay. Under such circumstances, therefore, great inconveniences and injuries might result to the service by the positive refusal to receive a prisoner.

Of the written statement of the crime of the prisoner.

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Of the 80th Article of War, how to be observed.

The language of the article of war, upon this subject, for the army of the United States, has, however, been thought generally to give to a commanding officer of a guard the right to reject a prisoner, unless a written charge be handed in. This interpretation of the article is derived from a very literal reading of it, and could not be maintained, if the purposes and intention of the same were duly considered. The objects had in view for attainment by this particular article, were of military significance, and public utility, and under the pressing exigencies of military life might be entirely frustrated, were a prisoner or prisoners to be summarily rejected by the commanding officer of a guard. So far as any personal responsibility may attach to his act, he may exercise a becoming prudence, to satisfy himself of the character of him who commits, and of him committed; that is, whether the one is authorised so to act, and the other amenable to such, or military authority. It is a safe rule then, and one having a direct regard to the public service, which ought to be observed, that whenever a prisoner thus offered is amenable to military law, and the officer confining him is known and responsible, the officer commanding a guard, or the provost-marshal, should invariably receive and keep in custody the prisoner so presented.

Prisoners confined without written charges.

And thus, likewise, in the case of soldiers confined without written charges: as the facts are generally known to the officer of the day, it might, in many cases, save unnecessary trouble, to make known the case to the commanding officer, instead of releasing the prisoner at the next

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considered to have had  
announcement, by a proper  
(off-officer,) of the command-  
olicer, that he is to consider  
d under arrest, is sufficient to  
the privilege, for the time being,  
as arms, or of exercising any of the  
his office.

when arrested, are usually allowed      Limits to arrest-  
mits, beyond which it would be a breach      ed officers.  
discipline to pass, and subject them to very  
e consequences. Should the crime alleged  
ainst the officer be of a very aggravated, or  
inous character, such as might reasonably be  
supposed, sufficient to induce the accused to flee  
or escape—he would then, in such case, be kept  
closely confined, or under the surveillance of a  
sentry.



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Non-commissioned officers not to be confined in the guard-house, except, &c.

Non-commissioned officers are not to be confined, in the guard-house, and mixed with privates, but shall, according to the 60th paragraph of the general regulations, be arrested and confined to quarters, or other limits, except in aggravated cases, where escape may be anticipated.

Confinement of privates.

Private soldiers are always confined to the guard-house, or prison-room, if such be provided at the post, and continue so confined until the announcement of the proceedings of the court by which they have been tried.

Of the 27th Article War ; power to inferiors to suppress quarrels, &c., &c.

There is, by the twenty-seventh article of war, extraordinary powers conferred on officers of every grade and degree, for the suppression of "quarrels, frays, and disorders," and in cases contemplated by the article, a senior officer is liable to arrest by his junior ;—and the law requires, on the part of all persons subjecting themselves to the exercise of such authority by the junior, or other, to give the most implicit obedience to the same. This is a wholesome check to the exasperation of feeling, and tumult of passion, which might in some circumstances be exhibited by men whose rank, years, and services, would operate as a very hurtful example to others, youthful and inexperienced — and therefore a strong motive to suppress such violence was necessary to be offered, which should, at the same time appeal to their professional interests, and personal pride.

An officer cannot demand, of right, a court-martial on himself or others.

The general regulations for the army point out, that "an officer has no right to demand a court-martial on himself, or on others ; the general-in-chief or officer competent to order a court,

being the judge of its necessity." "Nor has an officer, who may have been placed in arrest any right to demand a trial, or to persist in considering himself under arrest after he shall have been released by proper authority."

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There is no exception made to the rule last stated, and under its provisions, if arbitrarily persisted in, officers might suffer great grievances. But there is a means of seeking a remedy for all grievances inflicted by the improper exercise of power—and it is easy to be conceived that an officer placed in arrest, and charged with acts, impugning seriously his official or personal reputation, would suffer such grievance, were he afterwards restored to duty, and further proceeding or inquiry denied him.

Remedy for  
grievances, and  
the mode of  
seeking for re-  
dress.

The thirty-fourth article of war, provides, that, "If any officer shall think himself wronged by his colonel or the commanding officer of his regiment, and shall upon due application being made to him, be refused redress, he may complain to the general commanding in the state or territory where such regiment shall be stationed, in order to obtain justice; who is hereby required to examine into the said complaint, and take proper measures for redressing the wrong complained of, and transmit as soon as possible, to the department of war, a true state of such complaint, with the proceedings had thereon."

By authority of this article it is believed, that an officer has an open way presented for the presentation and removal of all grievances, which may affect him in the nature of a wrong. This article has by some been supposed, to be intended and confined, to wrongs perpetrated, or

Of the 34th Art-  
icle of War.

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supposed to be perpetrated, by the commander of a regiment, and that such as are suffered from a higher source, have not the same means offered for speedy redress. It is apprehended, however, that such a view of it is not consistent with the purposes for which it was enacted, or agreeable to just rules of interpretation. The object of the rule is the prevention of wrongs as well as for the redressing of them, and must have an equal application to every officer of the army. Now there are bodies, or portions of the army, which have not a regimental organization, and consequently, such portions would be excluded from the benefits of this article were such an interpretation to obtain. The nature of it is remedial, and must be construed accordingly, and as it is evident it was intended to present to the inferior officer a means of redress of the wrongs inflicted or caused by his superiors, such intention must prevail over the literal sense of the terms. The particular grade then of the person who commits the wrong, be he a regimental, or a general officer, cannot affect the means or the right of the sufferer to seek for redress; and this is in unison with the rule, that "Statutes that are remedial and not penal, are to receive an equitable interpretation, by which the letter of the act is sometimes restrained and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy."<sup>1</sup>

The article of war not only provides the means, and mode of redress to be observed by the complainant, but it takes from the general

<sup>1</sup> 1 Kent's Com., p. 434

officer to whom it is submitted, all discretion to authoritatively dispose of it by his own judgment. Upon receiving the complaint it is his duty, as the article requires, to take proper measures for redressing the wrong complained of; and such measures are to be in the nature of a direct and exact inquiry, in order that he may make a report thereon to the department of war. There is no particular mode of inquiry pointed out by the laws, and it would appear that the examination to be entered into must be in the nature of *ex parte* statements, or official reports. A court of inquiry cannot be summoned, because the matter does not fall within the competency of the general to convene one. Courts of inquiry are "to examine into the nature of any transaction, accusation, or imputation, against any officer or soldier,"—and such can be assembled only by the president of the United States, or when demanded by the accused. A complaint then of a wrong suffered would be an "imputation" against another officer, and, of course, a court of inquiry could not be assembled to examine into the same, by the order of the general, unless the officer thus impugned, should demand it.

In connection with the above article of war, the next or thirty-fifth article of war, prescribes the modes of procedure to obtain justice, for "any inferior officer or soldier, who shall think himself wronged by his captain or other officer."

No officer can be released from arrest, except by authority of the one imposing it, or by a superior officer. And any officer who shall leave his confinement before he shall be set at liberty

No officer to be released from arrest except by proper authority.

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by proper authority shall be cashiered. Breach of arrest is thus considered a very high military misdemeanor, and to prevent the exhibition, on the part of any officer, of such a contempt of the discipline of war, a penalty is affixed to the offence, which being peremptorily commanded, leaves no discretion in a court-martial to modify or abate.

Breach of ar-  
rest.

There has been a variety of opinions, among officers of the army, as to what constitutes a breach of arrest, and whether divers acts committed by an arrested officer would not amount to that crime. By some it has been said, that any act on the part of the arrested officer, which exerts a privilege conferred by his commission, or which assumes an active military character, as the giving an order, the wearing of his sword, or the making a visit of etiquette to a superior, though within the limits of his confinement, would, in fact, be a breach of arrest. But these opinions, it is thought, are erroneous, and the particular acts specified, or others of that description, do not constitute the crime contemplated by the article of war. The offence being highly penal, the act must be in accordance with the language of the law, or else the penalty which is denounced against it would not necessarily follow; and a charge exhibited against an officer for that offence, predicated on conduct referred to above, would be defective. Such acts would be, undoubtedly, improprieties, and some of them offending against the injunctions of the general regulations for the army, and would therefore be liable to animadversion and punishment. But it must be seen,

by a strict adherence to the language of the seventy-seventh article of war, that they do not make up the offence spoken of, and which is there clearly distinguished to be committed only by an officer, "who shall leave his confinement, before he shall be set at liberty by his commanding officer, or by a superior officer."

A court-martial has no further control over the kind of arrest of the prisoner, than what regards his personal freedom in court. The commanding officer is alone the responsible person for this; and the court, therefore, has no authority to require any indulgences, or to exact any restrictions respecting the prisoner, when not in court. The custody of the prisoner's person belongs to the commanding officer, as a part of his command, and subject to his discretion, and a case is quoted in which the commanding officer refused to accede to a suggestion of a court-martial to grant a prisoner certain indulgence, and was justified in such refusal.<sup>1</sup> But while the prerogative of a commanding officer is thus secured against infringement, by the acts of a too indulgent or careless court, there is required of him all assistance in his power to facilitate the business of the court; and it would be a serious matter of accusation against him, were he, in a mistaken opinion of his own position, or the dignity of his rank, to neglect or refuse those aids and attentions which so much conduce to the quiet and expeditious flow of the current of military justice.

A court martial has no control of the prisoner out of court. Commanding officer to afford facilities for the trial.

It is considered the duty of the judge advocate, to furnish the prisoner with a copy of the

<sup>1</sup> Simmons on Courts Martial, p. 121.

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Judge advocate  
to furnish pris-  
oner with copy  
of the charge:  
court to grant  
time for the  
prisoner's pre-  
paration.

charges upon which he is to be tried, at as early a period as possible, in order to avoid any delay in the progress of the trial. Where a prisoner has received a copy of the charges through another channel, as, for instance, the adjutant general, should any discrepancy exist between that and the copy submitted to the court, it cannot be pleaded in bar of trial, but the court would, under such circumstances, where the deviation was material, no doubt afford the prisoner time to prepare for the investigation by delaying proceedings. This course is clearly nothing more than one of common justice, inasmuch as an accused person should have a knowledge of the offences alleged against him previous to trial, and sufficient time allowed to enable him to defend himself against them.

Charges read to  
prisoners who  
cannot read: to  
be visited by the  
judge advocate.

To soldiers who cannot read, the charges are read by the adjutant: or the judge advocate visits the place of confinement, and there instructs them as to the nature of their offences, and gathers from them their means of defence, as lists of witnesses, &c. The attention on the part of the judge advocate, to the consultation which the ignorance and peculiar situation of soldiers call for, is a happy means for him to exercise that portion of the functions of his office, which is, to some degree, expected of him as counsel for the prisoner, and to prevent, in many instances, the perpetration of injustice. With recruits especially, or very young men, who have been apprehended at a distance from the depôt or station to which they are attached, and often without any previous investigation, consigned to the guard-house, under a charge of

Recruits: jus-  
tice of the ob-  
servance of  
such rule.

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desertion, there to await the assembling of a general court-martial for their trial, this intercourse is productive of the best results; and the writer, in his capacity of judge advocate, can recur to many instances in which substantial justice has been ensured to all parties by such means. Soldiers are proverbially careless, and frequently, when confined on charges, to be brought to trial, become reckless of their situation, and regardless of the proper means to escape therefrom. A little attention, therefore, on the part of the judge advocate prior to the arraignment, will, in frequent cases, save the individual from an undeserved rigor of punishment, and preserve to the service an active, faithful, and efficient man.

The crimes for which soldiers are generally tried, are set forth in a very concise and simple manner, nor is it often that any complication of facts exist to render them subtle or difficult. It is not probable, therefore, that any prejudice is likely to result to the prisoner by conversation with the judge advocate, prior to trial, and still less so is it, that the latter person would attempt, by his position, to surprise the accused into revelations to be afterwards used against him, or to offer him false or deceptive counsel.

It has been the custom of the service to append to the charges, a list of the witnesses intended to be called for their support, though it is not conceded as a right on the part of the prisoner to demand it; and the judge advocate also requires of the prisoner the names and designations of the witnesses he intends to call. Perhaps there may be, in this practice, some objec-

Crimes against soldiers set forth in simple language.

List of witnesses given with the charges; prisoner has no right to demand it.



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tions, inasmuch as it offers, to some extent, the means of improper influences being brought to bear; but as witnesses are frequently to be summoned from places at a considerable distance from the point of assembling the court, and great delay be experienced were such persons not timely notified, the custom possesses advantages which more than compensates for any probable inconveniences which might result.

Judge advocate  
to exercise a dis-  
cretion in sum-  
moning wit-  
nesses.

In summoning persons designated as witnesses by the accused, the judge advocate is expected to exercise some discretion. From a natural anxiety and excitement, a prisoner frequently deems the presence of some essential to his defence, when in fact there exists but the slightest, if any, reason for it. This happens more usually where witnesses are named, in order to testify to character, which is a portion of the evidence in many cases, in which the prisoner indulges an over-estimate of its importance, and frequently when there is no proper or necessary cause for seeking it. In all such cases then, the judge advocate must consider the interests of the public, as well as wishes of the individual to be tried. A ready acquiescence with such wishes would be often of positive prejudice to the service, by withdrawing officers from their appropriate duties, from great distances and at large expense. Such examples have been given in divers cases; and upon the presentation or examination of the witness called, it has proved as might have been anticipated, that he possessed neither knowledge of any facts connected with the trial, or opinions relevant to the matter, which could, in any

degree tend to the elucidation of the subject of inquiry.

Should the judge advocate decline to issue his summons for a witness, upon the suggestion of the prisoner, the latter may submit, through the judge advocate, an application to the court; and this is recommended to be done forthwith, in order to obviate any delay. The court having heard the particular reasons for calling a witness, will take into consideration the reasons offered, and decide accordingly; the whole proceeding thereupon being entered upon the record.

Although the names and designation of the witnesses, both for the prosecution and defence, are furnished, it does not, therefore, follow that either party is precluded from examining others who have not been indicated; on the contrary, any witnesses may be called and depose under the usual restrictions, at any time during the progress of the trial.

It has been made a question of how far a court martial can exert any right to originate evidence; that is, of calling for witnesses not produced by either party. This is certainly a matter of some consequence, and ought to be definitely settled. The utmost that has yet been conceded on this point is to permit a court to examine an individual who has been alluded to in the course of the trial, and whose testimony may elucidate some point referred to.<sup>1</sup> But even this is of somewhat doubtful propriety, while the greater latitude of calling for new witnesses in order to investigate more fully any matters

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Application to be made to the court to have witnesses summoned.

Witnesses not previously named may be called to give evidence.

Courts martial not competent to originate evidence.

<sup>1</sup> Simmons on Courts Martial, p. 413. Kennedy on Courts Martial, p. 141.

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which the prosecution or accused has not fully exposed, is in the opinion of the writer totally inadmissible.

The members of a court-martial are sworn to try the matter before them "without partiality, favor, or affection," and in order to do so it is their duty to attentively listen to, and consider every thing presented by the parties, without taking any active part in the means of prosecution or defence, beyond what the strictest duty enjoins. To summon witnesses of their own motion, would necessarily be an attempt to supply the deficiencies that may occur in the proof adduced by either party, and consequently a departure from the impartiality, which their oath requires, —and it is very certain that the court cannot require the presence of a witness from their own knowledge of the circumstances of the case, and who has not been cited by the prosecution or defendant.

A course of this kind on the part of a court-martial would tend to complicate the proceedings, and promote injustice. It could hardly be expected that the party calling a witness should not have some interest or feeling in the deportment, if not in the deposition of the individual, and an attempt by the opposite side to impeach the competency or credibility of such a witness, would to a certain extent involve the court in the inconsistencies and improprieties of appearing as an interested party. These remarks, merely glancing at the question, may it is hoped be sufficient to awaken attention to such a course of proceeding, should it ever be attempted in the military service of the United

States, and prevent its accomplishment, as it would be most certainly a violation of the principle upon which depends the impartial administration of justice.

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The members of courts-martial are detailed for such service from a rollster kept at regimental or garrison head-quarters, and for general courts-martial, at the head-quarters of the army, and of departments.

Members of  
courts martial  
detailed from  
the rollster.

No proceedings or trial can be carried on except between the hours of eight o'clock in the morning, and three o'clock in the afternoon, except in cases, which, in the opinion of the officer ordering the court-martial, require immediate example.<sup>1</sup>

Hours for pro-  
ceedings.

A court-martial once constituted by competent authority, continues in existence till dissolved by the same or superior authority. When charged to try a prisoner, if it has proceeded with the arraignment it cannot be dissolved without proceeding to judgment, except in cases where by the death or illness of members, it has been reduced below the requisite number; and where the illness of the prisoner, which may be of uncertain duration, suspends the business of the court. The prisoner under such circumstances would be exposed to a future trial.

A court martial  
duly constituted  
continues until  
dissolved.

The adoption of the above rule is founded in substantial reason, and operates as a safeguard to members of the military service.

Should a member be prevented from attending from illness, or other cause, either before or after the commencement of a trial, the court may adjourn from day to day for a reasonable time, to await his attendance: and should the

Courts martial  
may adjourn to  
await the at-  
tendance of an  
absent member.

<sup>1</sup> The hours, for proceedings of Naval Courts, are not limited by law.

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seat of a member be permanently vacated, the court will proceed, unless the number present falls below the prescribed minimum.<sup>1</sup>

Members may meet and adjourn from day to day, when the complement is not present.

The officers detailed for the composition of a court-martial, may meet and adjourn from day to day, when the legal complement is not present—but no judicial act in such a case can be recognised.

Courts martial cannot change the place or time of meeting.

The day, and the place of meeting of a court martial, can only be changed by the authority ordering the same. It has happened that a court-martial, has adjourned its sessions from one place to another, at the mere will or vote of the members—but such act was manifestly improper and beyond the competency of the court.<sup>2</sup> Whenever it becomes expedient or necessary to change the place of meeting, the reasons will be reported to the head-quarters whence emanated the order constituting the court; and authority from thence must be given before the change can take place.

Supernumerary members.

Thirteen members being the greatest number authorised for a general court-martial, it follows that it is only when such a complement is required that the necessity of supernumerary members occurs. It is therefore the custom, and it is of importance to prevent delay, and the repetition of labor, whenever the maximum number is detailed for a court-martial, to add thereto, two or more supernumeraries, who, in case of the absence of any of the regular members, or the va-

<sup>1</sup> The naval laws require the court to proceed provided five be present. (Naval Laws, Art. 39, p. 66.)

<sup>2</sup> An instance of this kind occurred some years ago, with a naval court martial, in the Mediterranean.

cation of their seats at any time of the proceedings, take their places, and the trial continues.

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Supernumerary members, at the assembling of the court, take their places at the board, according to rank (they are of course always the junior members) and are sworn with the body of the court, and this is done to guard against the inconvenience which might arise from the absence of a member. These additional members are present of course during the progress of the trial, and are permitted to discuss with the court, in close session, any question which may arise, though they cannot vote for the determination of the same. At the termination of the evidence and defence, when the court is closed for final judgment, the supernumerary members retire, as there is no occasion for their presence, but they must remain at the place of sessions, until the business of the court is completed, as it might happen, from some unforeseen casualty, that the attendance of one or more of them, in this last stage of the trial, might be needed to supply a vacancy.

Supernumerary members may discuss interlocutory questions, but cannot vote.

Challenge to a supernumerary is made at the same time, when the other members are challenged, and the propriety of this must be apparent, as the supernumerary member exercises a certain influence by discussing with the court, and determining to some extent the disposition of interlocutory opinions, which may have a greater or less bearing upon the issue of the trial.

Challenge to supernumerary member.

Should a court be reduced below the *minimum* number, an adjournment *sine die*, or for a definite period follows, according to circum-

Courts martial reduced below the minimum: how to proceed.

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stances, and the facts are reported to the proper authority—and this authority may declare the court dissolved, and issue a new warrant for the trial of the prisoner. The members who composed the first may make part of the second court, but they are liable to challenge with the new members, and the proceedings, *ab initio* must be *de novo*.

**New members.**

It has been maintained by some that new members may be *added* to a court-martial, (where no supernumerary members have been detailed,) if such persons hear or be well informed of the evidence given previous to their attendance:—and others have been of opinion that such *addition* would be correct, if assented to by the prisoner.

To determine the mode or course of proceeding by the consent of the parties, seems to be a very loose if not dangerous principle, and ought not to be permitted by courts except, perhaps, where it applies to some modification in the admission of evidence. The rules which have obtained for the direction of proceedings in courts of justice are generally founded upon some general principles of equity, or public policy, which ought not to be set aside for the convenience of individuals; and upon that principle, innovations and irregularities of every kind might be, by the consent of the parties, claimed and justified. Captain Simmons in his work on courts-martial, is very doubtful of its propriety, and only admits it under restrictions which amount to nearly the same thing as a new trial. Major Vans Kennedy thinks that such a course can be with safety observed, though there is a discrep-

ancy of opinion upon the same subject relative to the temporary absence of a member, which contradicts his judgment.

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The fact that all the proceedings of a court-martial are reduced to writing, and are, therefore, easily referred to, renders this course less objectionable than it would appear, were such not the case; and for such cause, as well as the detriment and inconvenience which the service might suffer, courts-martial have not been expected, in such cases, to adhere to the strict rules of legal procedure. When a new member has been thus admitted, the proceedings were read over, and each witness recalled, during the reading of his evidence, so that the new members might be satisfied that it is his evidence, and likewise have an opportunity of putting further questions to him if necessary.

This is the manner to be strictly observed, it is said, when new members are admitted,—though it is thought to be a safer means to resort to a new trial, by the constitution of another court. Under the rules which govern courts-martial in the army of the United States, it is not probable that such cases will arise. The appointment of supernumerary members, where the court is full, obviates the risk, and presents nothing objectionable to the interests of the prisoner, as he can challenge such member at the opening of proceedings. In other cases, where the court is composed of less than thirteen, the legal standard of five as the least number, or some other, declared by the order constituting the court, is the limit below which it cannot fall, and proceed with the trial; hence,

Court to be re-organized.



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it follows that all above that number, though regular members, are also situated in the light of supernumeraries, which provides for casualties. Under such circumstances, it is not likely that a court-martial will be reduced below the number competent to the exercise of judicial authority. But should such a case arise, it is to be preferred, as signified above, that the court be dissolved, and another ordered for a new trial.

Member absent from his place during the trial cannot resume it.

If a member of a court-martial, should for any cause be absent from his seat during the course of the trial, he cannot resume it. The supernumerary member would have assumed his place, or it would have been considered vacated, and thus he is excluded from any further participation in the trial. All the members of a court-martial, or such a number of them as are legally competent to continue the trial, must be present during the proceedings, on the reception of testimony; and resumption of his place, by a member who had been absent for any period while proceedings were going on, would vitiate the judgment of the court. It is essentially necessary that witnesses be examined in the presence of *all the members of the court*, for no act performed by a part of the court can be legal—and it is on this principle that the strongest objection to having new members *added* to a court is founded. The mere reading the recorded testimony in the presence of the deponent is not sufficient. A case of this description is quoted by Captain Simmons, p. 176, in which the reviewing authority said, "This proceeding is so directly at variance with the practice of courts-

Witnesses examined in the presence of *all the members*.

martial, and the principles of justice, that it may be held to affect the legality of the judgment of the court," and concluded his remarks by stating that "the irregularity before observed has *rendered nugatory* the *sentence* of the court-martial."

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There is no president, as such, appointed for a court martial, but the senior member presides by virtue of such seniority.<sup>1</sup> Having no special authority as an officer of the court, he exerts no greater authority than what is necessary for the preservation of order and observance of decorum. And in voting and every other exercise of his judicial capacity, he acts, and is regarded in the same light as other members. In questions of order, such as matters relating to propriety of deportment of an individual member, and the daily routine of business of the court, the president decides of his own motion; but in all others, which involve a consideration of proceedings, a vote of the court is necessary. Thus the daily regular adjournments of the court, are directed by him; but an adjournment out of the ordinary course, or for an unusual time, that is, longer than the ensuing day, or from a Saturday, over to the succeeding Monday, and which would therefore be an act of discretion, would be determined by a vote of the court.

No president appointed: the senior member presides. His rights and duty.

Who adjourns the court.

Should an adjournment be announced by the president, to which a member might have some reason for objecting, he would ask leave to present such objection, which thereupon might be submitted for decision to the court.

A court adjourns from day to day, and accord-

<sup>1</sup> This is the law also for the navy. Homan's Naval Laws, Art. 35, p. 64.

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Court adjourns  
from day to day,  
or for a longer  
period.

ing to the necessity of the case may adjourn over for a longer period.<sup>1</sup> On an adjournment *sine die*, the court is reassembled by an order from the same authority by which it was constituted: and upon such an adjournment, the members (240 par., general regulations) will return to their respective corps and duties, unless otherwise ordered.

President orders the court to be cleared.

The president directs the court to be cleared for deliberation when he thinks it expedient, or for any incidental discussion, at the request of a member, or the judge-advocate.

Prisoner and witnesses to be treated with respect.

The prisoner and witnesses are to be treated by every member with due respect, and reproachful words, or contemptuous manner used or manifested towards them by any member, would be an offence deserving severe censure. The president is responsible that all persons called before the court are treated in a becoming manner.

The president to report improper behavior of members.

In case of intemperate words used, or improper behavior exhibited by any member, the president will, by virtue of his position, enforce order, and further will report the same to the officer ordering the court to assemble.

Parties may claim the benefit of the court's opinion.

The parties before the court may claim the benefit of its opinion upon any question of law or custom, arising and disputed, in the course of the proceedings, and in the decision of which either may be interested.

Court deliberates with closed doors.

Deliberation of the court takes place always with closed doors. At other times it is open to the public, military or otherwise, with such re-

<sup>1</sup> Naval courts martial, during a trial,<sup>2</sup> are bound by the law, to adjourn from *day to day*.

strictions as the convenience of the court and parties, and capacity of the room may dictate.

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A majority of votes determines all questions (not the finding of the court), and where there is an equality of votes, it is decided according to the manner in which the question is put,—that is, in an affirmative or negative form.

Majority of votes determines.

A court-martial duly constituted and organized, cannot have its proceedings interfered with by the highest military authority, much less be dictated to. Bound by the solemnity of an oath, and the obligations which general society impose for the observance of justice, their course is determined by the law and customs of war, and in cases of doubt by their consciences and understandings. But members of courts-martial, would do well to constantly bear in mind, that though their judgments may not be dictated to, or be controlled by any authority, yet they are collectively and individually responsible to the civil courts, for any abuse of power, or illegal proceedings. There is no instance in the course of the annals of our military jurisprudence, in which an appeal has been made to courts of civil judicature for redress of wrongs committed by a military court, but there are a number of cases cited in the works of writers on the practice of British courts-martials, in which prosecutions have been instituted, and entertained by the civil tribunals, for abuse of power, or illegal conduct on the part of courts-martial.

Proceedings of courts martial cannot be interfered with, nor dictated.

Members responsible for their acts collectively and individually.

The amenability of the members of courts-martial to the civil courts, for improper acts, committed in their military-judicial character, is indisputable, and has been sustained by frequent

Judge advocate not responsible for his opinion, except in his military capacity.

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decisions. But there is another question, relating to illegal proceedings of courts-martial, whether the judge-advocate is responsible or not for opinions which he may give, not yet settled. A diversity of opinion exists in regard to this point, and the best writers on English military law are at variance on the subject. The question has not yet been tried by any case, and there exists no legal decision, whereby the general reasoning of the inquirer might be assisted. Captain Simmons expresses his decided opinion that the officiating judge-advocate, whatever degree of deference may be due to his advice, "is not responsible to any court of justice for any opinion which he may give."

To this opinion, Captain Hughes, in his work entitled "Duties of Judge Advocates," vehemently objects, and cites the fact, that "Kennedy, Hough, and all others are diametrically opposed to the opinions advanced by Major Adye and Captain Simmons," and then adds, "But the fact *that there is a difference of opinion*, is a convincing proof of the necessity that exists, that a clear exposition of the law, and explicit regulations on this subject should be issued by *authority*."

Such is the state of opinion in regard to this point in the British army, while the same question in the United States army, has very seldom, if ever, been agitated. It is, however, a matter of some interest, and might tend to the more cautious action of courts-martial, and a nicer discrimination of advice offered by the judge advocate, if the responsibilities of this officer were clearly understood and settled.

From the manner in which the judge advocate, at present, is appointed to officiate at trials before military courts, responsibility for legal advice or opinions offered by him, would be not only unreasonable but approaching the ridiculous. There is now, for the army, no established military law department, and the consequence is, that it frequently happens that officers without experience, or the necessary qualifications for the fulfilment of the duties imposed, are appointed to officiate as judge advocates. How then can it be expected that a sound discretion should be exercised, or a prudent foresight manifested, an efficient intelligence displayed, or a competent knowledge brought to bear, to make light and safe the path in which a court should walk !

Hence it follows, that the person officiating as judge advocate is frequently less fitted to advise the court, than any individual making part of it; and of course, in such cases, his opinion, if ever asked, is received with very little deference, and acted upon with less confidence.

As courts-martial must exercise a discretion of their own, in the adoption of any opinion offered, or acceptance of any rule, for the government of their proceedings, and are not at all bound to follow implicitly the opinions of the judge advocate, it would seem that any decision of theirs should not involve, in any liability to future censure or punishment, that person. It is true that his agency to determine their course may be very direct; but still he is without a judicative voice, and but expresses an opinion (conscientiously, it is presumed,) in the perform-

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ance of a duty. Now, if the opinion be so clearly expressed, as to guard against misapprehension, and so forcibly illustrated by arguments or authorities, as to dissipate doubt, there can be no risk in the action of the court; while, on the contrary, if doubt still exists, the court may adjourn to make a reference of the question, or to fortify their minds for a future consideration of it.

Every facility, and means to come to a proper understanding of the subjects before them, and to avoid error, are permitted to courts-martial by the power inherent in them, to adjourn from time to time, when the mind may be confused or perplexed by new or unconsidered questions, and thus prevent mistakes which are likely to flow from hurried or precipitate judgment. From considerations of this nature, the writer thinks that the judge advocate is not responsible to any civil court, for any part which he may take in the proceedings of a court-martial, though, as a military person, he is undoubtedly responsible to the authority by which the court is assembled, for the becoming and faithful execution of the trust confided to him.

The purpose of requiring the opinion, or advice, of the judge advocate upon doubtful or controverted points, is, (supposing him to be a person of sufficient skill,) to enlighten and assist the court. Such was the policy in view, considering the court as an administrative body. But this is not all. Inasmuch as the members of courts-martial are subject to military law, and the judge advocate also, when appointed from the army, it was a means to show upon

what grounds the opinion of the court was based, as well as the capacity and zeal with which the judge advocate performed his part. Thus, it is evident that the revising authority, looking solely to the military proprieties of their respective places, might understand how the errors of one found some palliation, by according with the opinions of him appointed to inform them in the law; and how the other was absolved from blame, for errors committed which his advice could not restrain.

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If the principles above stated be admitted, it would seem that the custom (more particularly in the navy, it is no longer followed in the army,) of appointing persons from civil life to officiate as judge advocates, is clearly objectionable. It creates a ministerial officer, without legal responsibilities, and necessarily commits to his hands, high interests of the government, and to some extent, the rights and reputation of individuals, to be treated and observed, without any stronger guaranty of fidelity, than his own sense, or impressions, of moral obligation.

Appointment  
of judge advo-  
cates from civil  
life objection-  
able.

The general regulations for the army, stigmatise, as being highly improper, to hold charges against an officer or soldier, in order that they may accumulate, so as to form collectively a crime of sufficient magnitude to justify a prosecution; and declares the principle, that if the facts, as they arise, are not of a kind to be made matter of charge at the time, they should not at a future period, be brought up or revived. This is certainly an equitable rule, for nothing can be more adverse to good order, or more unbecoming in conduct, than for an officer to store away in

Improper to  
hold back charges to accumulate.



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his memory, or commit to the keeping of a black-book, the foibles and improprieties of a brother officer, or of an enlisted soldier, to be, at some future time, when angry or inimical passions excite him, arrayed against the delinquent, as breaches of discipline, or of the becoming deportment of a gentleman. There have been cases of this description, which have broken the harmony which ought to subsist between the members of the military community, and called forth the severest animadversions of the court, and the commanding general. It is, however, of rare occurrence, and in every instance it is believed, where satisfactory evidence of its existence has been shown, the result has been painful and humiliating to the accuser.

Charges to be founded in public utility, and be well considered.

Charges, therefore, should always be founded in public utility, and not be seized as a means of gratifying personal resentments; and should likewise be well considered, in relation to their character, and the means of maintaining them by sufficient evidence, before they are presented for prosecution.

Courts martial to judge of the propriety of the charges.

It is the duty of a court-martial, after being duly organized, and when the charges are read, to judge of their propriety, not only as to the nature of them with reference to their jurisdiction, but also as to the precision of the language used, and the statement, or definition of the crime. On the charge being read, "should any doubt arise, whether originating with the members of the court, or with the parties on the trial, with regard either to the competency of the court's jurisdiction, or the relevancy of the charges, these doubts must now be discussed.

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For, should there appear any objection to the legality of the trial, which is self-evident and insurmountable, such as the prisoner is not subject to military law, or that the crime charged is a civil offence, the court ought to suspend their proceedings, and to submit the objection to the consideration of the authority by whom it may have been assembled: it is also held that it is an undoubted right, and even the duty of every court-martial to reject any illegal or erroneous charge."<sup>1</sup>

And so, likewise, if the charge is drawn up in a loose and indefinite manner, though it may not be absolutely repugnant to military law, may the prisoner, previous to pleading to the arraignment, call upon the prosecution to specify the particular facts, of which he intends to accuse him, and as this is founded in material justice no court-martial can refuse it.

Prisoner may object.

The observation of this procedure is important, and will often prevent the laborious and unprofitable business of entering into the investigation of very inaccurate or improper charges.

The judge advocate will, upon the presentation to the court of a charge deficient in accuracy or perspicuity, remonstrate against proceeding to trial on it; and all doubts which may arise, or objections which may be made to a charge, by the court, the judge advocate, or the prisoner, will, with the proceedings and the decision of the court thereon, be regularly and fully recorded.

The judge advocate may remonstrate against a charge.

Previous to the arraignment of the prisoner, it is perfectly competent to the authority ordering

Charges may be amended.

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the court, or to the judge advocate, being authorized so to do, to alter or amend the charge;<sup>1</sup> but after the prisoner has pleaded, it is irregular, and would not be allowed to make any change except in case of a plea of abatement, for a misnomer or wrong addition. In such case the charge can be amended according to what the prisoner shall declare to be his true name or addition;—and the trial will proceed as if no such dilatory plea had been pleaded.

Additional charges not to be entertained after the arraignment.

No additional charge can be entertained by a court-martial against a prisoner, subsequent to the swearing of the court, and the arraignment. This would seem to be established not only upon the known rule of law, that no innovation shall take place pending the original issue, but also upon the terms of the oath administered to each member. "You do swear that you will well and truly try and determine, according to evidence, *the matter now before you.*"—The prisoner is undoubtedly amenable for acts, unconnected with the matter in issue, committed either before or subsequent to the arraignment; but an offence thus questioned must be presented as a separate charge, and can only be noticed by the court under special authority, when the trial will be distinct. The court, in order to try it, must first pass judgment on the charges to which the prisoner has pleaded, and then, being re-sworn, proceed without reference to the former trial, as in ordinary cases.

Contempts of court, punished irrespective of rank.

To ensure orderly and quiet proceedings, and for the protection and vindication of the dignity

<sup>1</sup> See Chap. XV., entitled "of the Judge Advocate," for a fuller statement of his duties.

of courts-martial, the seventy-sixth article of war provides, that "no person whatsoever shall use any menacing words, signs, or gestures, in presence of a court-martial, or shall cause any disorder or riot, or disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial."

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Contempts which may thus be summarily punished by a court-martial, are such as are committed in the face of the court, and of a public and self-evident kind, and not requiring any interpretation of law, nor admitting of further investigation to determine. In cases of contempts, where the court intend to proceed directly against the offender, it is proper and just that the party should be admitted to appear and make such explanations to the court, as he may desire.

Party committing a contempt is permitted to appear and be heard.

There can be no doubt but that courts-martial, under the authority of the above quoted article, are fully empowered to proceed against military persons. It has been the practice for centuries in Europe, for courts-martial to exercise a summary jurisdiction in contempts, and to extend that power in certain circumstances far beyond the mere military community. And this power, in relation to members of the army derives no intrinsic value or vigor, from the accidental superiority of rank of the members of the court, to that of the person offending, but flows from an inherent right for the due administration of justice. It therefore follows, that a court-martial, whose authority is the direct emanation of the law, claims on that account respect, and not from the accidental rank of the

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persons employed; and all military persons, without regard to relative rank between themselves and the members composing the court, must observe its requirements and mandates, for the preservation of order, and the fulfilment of the objects for which it has been assembled.

A case falling under the head of contempt, is reported by Samuel in his work on military law, at page 635. Major John Browne of his majesty's 67th regiment, was placed in arrest for a contempt committed in the face of a court-martial, held at *Antigua* in the year 1786.

Major Browne questioned the authority of the court to put him in arrest, being composed of members, saving the president, of rank inferior to himself, and said he would submit to the arrest only because it was imposed by his superior, Colonel Foster, the president.

The observations of the court in relation to the conduct of Major Browne, are so just and forcible as to make them of value, and they are therefore transcribed.

All courts-martial have equal power to preserve order.

"The court cannot but express their surprise  
 "that a doubt should have been entertained on  
 "the point, (the arrest,) but since their attention  
 "has been directly called to it, they take this  
 "opportunity of declaring their opinion, that *all*  
 "courts-martial, *legally constituted and convened*  
 "for the *administration of justice*, have, while  
 "*acting in the discharge of their duty, equal*  
 "powers and *authority* for the purpose of *pre-*  
 "*serving decency, and good order, repressing con-*  
 "*tempts, and the more effectual attainment of*  
 "*truth*, whatever may be the rank of the offi-  
 "cers, which constitute those courts respective-

ly; and that the prosecution, prisoner, and witnesses, although they may happen to be of superior rank in the army to those who may form any such court-martial, are equally bound to observe the lawful injunctions of the court, as if the same had been altogether composed of officers of a more elevated rank."

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The principle laid down so clearly in the above extract, cannot be doubted, and upon its observance depends the utility and dignity of military courts.

A general court-martial, without regard to the rank of its members, is the highest judicial body known to the military state, and under the jurisdiction it possesses of trying all offences and all persons, subject to military law, it may in cases of contempt proceed to pass judgment upon the offender. But a regimental or garrison court-martial in similar cases cannot award punishment against a commissioned officer, being from its constitution excluded from taking cognizance of offences by such persons. Under such circumstances, the inferior courts would only have power to impose an arrest on an officer, whatever might be his rank,—and report the same, with the cause therefor, to the proper authority.

Regimental or garrison courts martial cannot award punishment against a commissioned officer, but can place the offender in arrest.

It has been stated as an objection against the summary proceedings of a court-martial for a contempt offered to it, that the court is a *party* as well as the *judge*, which characters are deemed incompatible with the becoming administration of justice. But when it is considered that the offence is one requiring no further investigation; and that a reference to another court-martial of the charge for trial, is committing the

Summary proceedings of courts martial for contempt.

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subject to a body which must necessarily feel the same interest for the dignity of courts-martial and entertain a like jealousy for the contempt of the respect due them, there would appear to be no sufficient reason or advantage for such a course. On the contrary the delay that would ensue, and the danger of witnesses being absent at a future time, and the loss of facts, or sayings, might very materially endanger the ulterior proceedings or judgment of the court. It is therefore better, that the court which has been insulted, should also be the body to declare the penalty.

The 76th Article of War; not applicable to non-military persons.

The language of the article is very comprehensive, and embraces all persons *whatsoever*, by its terms; yet it is a question how far the legal authority of a court-martial extends, to punish contempts offered in its face, by persons not belonging to the military profession.

The distinctions to be observed, in the application of the power of punishment by courts-martial, to different classes of persons, are not definitely set forth in the military acts, or the progress of opinion concerning the respective rights of such persons, has varied, or changed the interpretation of the law from what it was really intended to be at the time of its enactment. In the broad signification of the language of the article, that the word *whatsoever* evidently intended to subject every person who might offend against the provisions of the act, to the discretionary action of a court-martial, cannot be misunderstood; and yet, when it is remembered, that the language of the article was borrowed from the military institutes of a foreign

nation, in which the sovereign, one branch only of the legislative power, was authorised to make regulations, or "articles of war," for the better government of the military forces, it would seem that the law is not binding on the citizens of the country generally, or on any others than those belonging to the military society.

But the law, as it exists in this country, does not flow from any delegated or inferior authority, but proceeds directly from the highest source of legislation—the congress of the United States, and, in this particular, materially differs from its prototype: yet the object of this law was, as in England, for the better government of the military establishment, and thence comes the doubt as to the competency of courts-martial to exert their authority to arrest, or punish persons in civil life. The breach of this law has been, and is likely to be, of such rare occurrence, that the doubt has been suffered to exist, and might still be permitted to exist, without much anxiety for its solution; though the importance of understanding clearly, the power which a court of justice possesses, to protect and regulate its proceedings, makes the question in itself one of great interest.

It has been justly said, that "laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory."<sup>1</sup> And such is the lamentable condition of military laws, where the authority to cause them to be properly observed is denied to the courts appointed to administer them.

As courts-martial have no appointed means

<sup>1</sup> 4 Black. Com., p. 285.



## CHAPTER

## V.

Procedure for  
contempts  
against non-  
military per-  
sons.

of enforcing their mandates against persons in civil life, supposing the power to make such mandates to exist, a procedure against such would be nugatory and vain : and yet, it may be asked, shall disturbances of the proceedings of courts-martial, by persons not belonging to the military community, be permitted to pass with impunity ? Certainly not. In such cases, where the court sits within the limits of a garrison, or territory subject to military jurisdiction, the court can, undoubtedly, cause the offender to be ejected from its presence and put beyond the military limits. And when a court-martial holds its sessions in towns, or at places not known as military posts, such persons may likewise be put out of the presence of the court ; and should further disturbance be made or attempted from the outside of the court room, the civil authorities may be appealed to, to proceed against the offenders for a breach of the peace.

How far the United States civil courts of law could exert any authority, under the provisions of the article of war cited, to interfere for the maintenance of order, and the protection of the course of justice in military courts, upon information laid before them, is not considered ; but such procedure would seem to be only in consonance with reason, and the principles of judicial propriety : and for menaces or contemptuous conduct before a court-martial, the civil courts ought to be authorised, upon due application for the punishment of the aggressor, to grant an attachment.

In order to promote the ends of justice, and to guard against prejudicing the public mind in re-

lation to any trial, as well as to secure an honest and sincere declaration on the part of witnesses, who might be, by the course forbidden, instructed in the detail of their evidence, courts-martial may forbid the publication of its proceedings before the termination of the trial. A violation of this order of the court would be a contempt, and liable to be noticed and punished as any other species of contempt may be. This right of the court is important for the safety of the prisoner, and makes very apparent how needful it is that courts of justice should be clothed therewith.

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Courts martial may forbid the publication of proceedings before the termination of the trial.

Partial publications tend to pervert the public understanding; and though, in some cases, it has happened that good effects have been derived therefrom, yet, as the rule is founded upon considerations of general justice, such accidental benefit is not sufficient to counterbalance the injury, which it is more likely to produce.

When the hour is arrived for assembling, the members of a court-martial take their places at the table according to rank, on the right and left of the president, the latter at the head of the table. The judge advocate is seated opposite to the president. The prisoner and his counsel have a place assigned, with the necessary accommodation for writing, on the right hand of the judge advocate. The witness stands near the judge advocate on his left hand.

Order of assembling, and places of members.

In case a third party, as prosecutor,<sup>1</sup> should be permitted to appear, he will be placed to the left of the judge advocate; and the interpreter,

<sup>1</sup> Though such a person is not, strictly, authorised to appear on military trials, yet the place for one is designated. See Chapter XV.



It has been stated in a preceding page,<sup>1</sup> that it is the duty of courts-martial upon being duly organized, and when the charges are read, to judge of their propriety. As however, upon the reading of the charges, and without a previous perusal of them, no objection might present itself to the mind of any person connected with the court, it would be a good method to observe the suggestion above, and previous to the arraignment, to clear the court, and then consider the character of the charge submitted. For although the prisoner might subsequently plead the want of relevancy, or perspicuity in the charge, still, as the court is the judge of its own competency at any stage of its proceedings, and is bound to notice questions of jurisdiction whenever raised, the mode of procedure now suggested, could never, in any instance, militate against the interests of the accused ; and might, in some, save much useless trouble and individual responsibility.

<sup>1</sup> Page 100.

## CHAPTER VII.

### OF THE TRIAL AND ITS INCIDENTS.

#### CHAPTER VII.

Room for the  
court to assemble.

A COURT-MARTIAL having been deemed necessary to investigate the conduct of an officer or soldier, against whom a charge has been preferred, the order appointing the members and judge advocate to compose the same, as well as the time and place of meeting, is duly promulgated. It becomes then the duty of the judge advocate, to provide, under the authority of the commanding officer of the post at which the court is to meet, or through the intervention of an officer of the quarter-master's department, or by his own authority, in case there be no military agent present at the appointed place of assembling, a proper apartment for the accommodation of the court.

Guard to attend  
the court, orderlies.

If necessary, a guard is furnished, or posted over the court, and receives orders from the judge advocate. The requisite number of orderlies in waiting are detailed, and previously placed under the control of that officer for summoning witnesses, notifying members of the hour of meeting, and giving such attendance as may be required.

The members of the court being assembled, take their respective places according to rank; and any preliminary matter which may have required their attention being disposed of, the court is proclaimed open. The parties are then called and appear in court.

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The prisoner is sometimes attended by a commissioned officer, or by a guard, according as his rank, or the nature of the charges may require.<sup>1</sup>

The prisoner, unless there be danger of escape or rescue, must appear without fetters, and free from shackles of any kind : indeed, after having pleaded, he has a right to demand, that during the trial he may be without irons or bonds.

Prisoner to be free from fetters.

The court has no control over the prisoner, except during the time of his presence in court ; and when the court adjourns, the prisoner is remitted to the hands of the guard, and the authority of the commanding officer, resumes the entire direction or superintendence.

Court no control over prisoners, except in court.

The prisoner should be allowed a chair, and Sir C. J. Napier thus reasonably and humanely suggests the propriety of such a rule. " Why," says he, " should a man be kept on his legs from eight o'clock in the morning till four in the afternoon ? This is hard upon him, (the prisoner,) under such unfortunate circumstances, even if he be strong ; if he be a weak and agitated man, as many are, it is cruel."

Prisoner allowed a chair.

The names of the members are then called over by the judge advocate, according to seniority, and they take their places, as has been indicated already, on the right and left of the president, alternately, according to rank.

Names of members called.

It is not necessary, although such form has been observed very frequently, to call the witnesses into court, previous to the arraignment. The only object to be obtained thereby, was, to give the prisoner an opportunity of knowing whether

Witnesses called.

<sup>1</sup> At trials before naval courts martial there is a suitable person detailed to act as provost marshal.

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Room for the  
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A COURT-MARTIAL having been deemed necessary to investigate the conduct of an officer, against whom a charge has been made, the order appointing the members and advocate to compose the same, as well as the time and place of meeting, is duly promulgated. It becomes then the duty of the judge-advocate to provide, under the authority of the commanding officer of the post at which the court is to sit, or through the intervention of a quartermaster's department, or other proper authority, in case there be no military department at the appointed place of assembly, a suitable apartment for the accommodation of the court.

Guard to attend  
the court, or  
orderlies.

If necessary, a guard is fixed over the court, and receives the judge-advocate. The requisite number of orderlies and waiting are detailed, and placed under the control of that officer. The orderlies, by their dresses, notifying members of the court, and giving such attendance as may be required.

The members of the court take their respective places, and any preliminary matters required their attention being proclaimed open. The prisoner then appears in court.

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permitted, but the prisoner must assign his reasons in writing, or if brief, the judge advocate will record them as stated.

In case a member should be challenged, (and only one can be challenged at a time,)<sup>1</sup> the reasons therefor, and when susceptible of such, the reply or explanation offered, are committed to writing as a part of the minutes of the court, and make a portion of the proceedings; and the court is cleared in order to deliberate and decide on the objection assigned.

The member objected against, always withdraws during the discussion which follows, and of course, does not vote on the question. Upon the re-opening of the court, the judge advocate, (by direction of the court,) makes known the decision, and the challenged member resumes his seat, or withdraws altogether, as the case may be, and a member in waiting, or supernumerary, if any be detailed, supplies his place.

Courts-martial generally, in cases where the public service may not receive detriment by delay, or when there is a sufficient number to proceed with the trial, are not very exact or critical in the consideration of the objections made to a member by the prisoner. It is supposed that even in cases where the prisoner labors under a misapprehension in regard to the facts objected to in the member, there should be the most liberal indulgence conceded that views of public duty would justify—and this not only in a spirit of sympathy for the painful condition of an accused person, but also from the consideration, that in the breast of a challenged member, al-

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VII.

Peremptory challenges not allowed.  
Challenge to member and reply to be recorded.

The member challenged withdraws.

Courts martial not so rigid as to cause being assigned as in common law courts.

<sup>1</sup> 71st Article of War.



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though the assigned causes may be founded merely in suspicion, there might possibly be inspired, to some extent, the very prejudices, against the operation of which the prisoner was so solicitous to be protected.

Cautions as to challenges.

But courts-martial will, however, in the exercise of such a discretion, be careful that such a disposition on their part, be not taken advantage of by a perverse or unreasonable person; and the cause of challenge assigned by a prisoner will always be stated in becoming and respectful terms.

Judge advocate cannot be challenged.

The judge advocate cannot be challenged on any pretence whatever: he is merely a ministerial officer of the court, and exercises no judicial capacity whereby a cause of challenge could be preferred.

Courts martial have a deliberate capacity previous to being sworn.

Although the law for the government of courts-martial requires each member to take a prescribed oath, as a necessary qualification for the exercise of judicial authority, still, a court-martial when assembled, if the competent number be present, possesses, previous to being sworn, a deliberative capacity, and is competent to decide on the propriety, or validity of any exception made to a member.

Challenges decided by the declarations of the parties; difference in this respect between military and common law courts.

When challenges are made to a member, or members, courts-martial decide on the declarations of the challenger, and challenged officer, and of the witnesses adduced;—for there is no authority for the court to receive evidence on oath, previous to the administration of the one prescribed for the members. In this respect it differs from the procedure of the civil courts, where tryers are sworn, not of the jury, to de-

termine whether the juryman challenged will try the prisoner indifferently.

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Various causes  
of challenge.

Challenges are of various causes, and are divided by lawyers into four kinds. They are not all such as are usually applicable to military courts. Those which most usually arise for the consideration of courts-martial fall under the third head, as *propter affectum*, though it might happen that challenges might arise under some of the other heads. Challenge for suspicion of bias or partiality is the most frequent: this may either be a *principal* challenge, or to the *favor*.

"A *principal* challenge is such, where the cause assigned carries with it, *prima facie*, evident marks of suspicion, either of malice or favour; as that a juror is of kin to either party within the ninth degree; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him. All these are principal causes of challenge, which, if true, cannot be overruled; for jurors must be *omni exceptione majores*. Challenges to the *favour*, are when the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance and the like."<sup>1</sup>

A principal  
challenge.

Challenges to  
the favor, of in-  
terest in the for-  
feiture of the  
prisoner's com-  
mission.

It is a good ground of challenge that a juror has a claim to the forfeiture which shall be caused by the party's conviction. Now it is the case that upon conviction of an officer he

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may, by the sentence, incur a forfeiture of his commission, which the next in rank or succession to him may be said to have a claim to; but whether this should be admitted as a cause of exception to a member has not been decided. I am inclined to the opinion, however, that in every case where such fact is objected to by the prisoner, the member challenged should withdraw.

Peremptory challenges not allowed; frivolous causes not too readily admitted.

In reference to this part of the subject, it must be borne in mind, that peremptory challenges are not allowed by courts-martial, because the interests and circumstances of the military service will not at all times permit an equal facility of replacing a member, as exists in the case of a challenged juror in the civil courts. And therefore it is incumbent upon courts-martial, to see that *frivolous* causes of challenge are not too readily admitted.

Right to challenge is reciprocal to the parties.

The right of challenge to the parties is reciprocal, and it is one which the judge advocate, in particular circumstances ought to exercise.

Member objected to from prejudice asks leave to withdraw.

In general, a member objected to upon the ground of prejudice or malice, asks leave to withdraw, which the court ordinarily feels disposed to comply with, though it is maintained by some writers that they ought to be assured of the sufficiency of the cause of challenge. The causes of such description of challenge are of a more delicate nature than others, and officers preferring them must always experience the difficulty and inconvenience of being denied the right of peremptory challenge.

Major Van Kennedy<sup>1</sup> very justly observes, that

<sup>1</sup> Page 21.

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"courts-martial therefore, when such a cause is hinted, prefer rather to deviate from the strict line of their duty than to enter into any discussion which might be productive of disagreeable consequence. They accordingly refrain from all inquiry into the particular circumstances whence this suspicion may have arisen, and permit the member challenged to withdraw. But should the court deem it expedient, or the public service render it necessary that these circumstances should be taken into deliberation, the decision on their relevancy or validity must depend entirely on the good sense and sound judgment of the members of the court."

- It is a good ground of challenge to a member, (should such by inadvertence happen to be the case,) that he is interested in the result, or has been injured by the prisoner, for which act he is brought to trial. A sentence of a court-martial was remitted, from the circumstance of an officer being a member, whose property the prisoner had attempted to steal.<sup>1</sup>

Of interest in the result of the trial.

Having been a member of a regimental court-martial, from the decision of which an appeal has been made to a general court-martial, is sufficient cause of exception to a member.

Having been a member of a court whose decision is appealed, a good challenge.

An officer having been a member of a court of inquiry held to investigate the subject of the charge, is ineligible to sit as a member of the court-martial.

Having been a member of court of inquiry to investigate the same subject, incapacitates.

It is held by some writers on English military law, that such person can sit as a member of the court, to try the charge, provided no opinion on the merits of the case had been expressed

The objections for excluding members of courts of inquiry.

<sup>1</sup> Simmons, p. 164.

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by the court of inquiry. But this rule is entirely rejected in the service of the United States, and is founded upon substantial reasons. A court of inquiry is assimilated to, and held in many respects, in the light of a grand jury, and a member is not supposed to be able to come to the trial, with a mind perfectly free and unbiassed. Although no opinion has been given, still as there has been of necessity a consideration of the facts in controversy, and it may sometimes be, that the statements made before a court of inquiry are entirely *exparte*, it cannot be otherwise than that the members of such courts do *mentally* form an opinion, upon the conduct of the accused. It would therefore be quite incompatible with a fair trial, that a member who had been thus exposed to the impressions that a previous examination may have made, should retain a seat during the trial of the prisoner.

Major Haugh's  
opinion to dis-  
tinguish cases.  
Objection to  
such view.

Major Hough is of opinion that a distinction should be made in certain kinds of offences;<sup>1</sup> but it is apprehended that if courts-martial were permitted to distinguish cases in this way, they might at times overstep the strict limits of propriety. The question involves a clear principle of right of the parties before the court, and as such, is of more importance than the consideration of convenience. The practice therefore is decided, and an officer who has acted as member of a court of inquiry, cannot sit on the court martial at the trial.

How far an exception taken to a member, on the ground that he was a member of another

<sup>1</sup> Military Law Authorities, pp. 44, 45.

court in which the *same matters* happened to be material, though not directly in issue, and held either for the same cause, or upon the trial of another action, might be considered valid, must depend upon the circumstances under which they arise. There is a diversity of opinion whether a challenge can be maintained, for having been a member of a court of inquiry, or court-martial in which the circumstances about to be investigated have been discussed, either principally, collaterally, or incidentally. The reason for supposing such cause of exception against a member sufficient is, that there is a possibility that there may be a *premature* opinion from incomplete evidence; while a contrary opinion is supported on the ground that no analogy in the custom of common law courts can be shown to support such position. "It hath been adjudged to be no good cause of challenge, that the juror hath found others guilty on the same indictment; for the indictment is in the judgment of the law, several against each defendant, for every one must be convicted by particular evidence against himself."<sup>1</sup> And it is a well known custom, for courts-martial composed of the same officers, to investigate charges, not only collateral, but arising out of the same facts, or identical.

How the investigation of circumstances attending facts, which may be subsequently made the subject of examination on another trial, can prejudice the minds of the jurors, inasmuch as they are not applied to the person to be afterwards tried, the writer cannot readily perceive.

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If it is a good cause of challenge, that a member sat on another court where the same matters were considered.

<sup>1</sup> 2 Hawk., 589.

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The existence and description of certain acts have a definite character without reference to the actor, and a knowledge of these can hardly tend to a forejudgment of any person, before they are directly charged, and made applicable as the measure of criminality, by specific and positive evidence. Unless, therefore, there be something peculiar in the investigation previously had, and by which a question of the prisoner's guilt may have been agitated, such objection against a member of a court-martial could not be sustained.

Not admissible.

Not to be confounded with the objections against members of courts of inquiry.

And it must not be supposed that there is anything contradictory in the last paragraph, to what has been said in another page in relation to members of a court of inquiry. In the case of a court of inquiry, the matter is directly applied to the person impugned, and not considered in an inferential, or collateral light, and consequently must exert a corresponding influence upon the judgment. But in the other circumstances of considering facts, it is but an accident which brings them to view; and though made the subject of discussion, still they are but secondary in their nature, and are never directly considered as acts of guilt of a third person.

Commanding officer of prisoner, not always a sufficient cause of challenge; such relation between member and prisoner ought to be avoided.

It is not always considered a good ground of challenge to a member, that he is the commanding officer of the prisoner's regiment. It is an undoubted fact, however, that as a rule, the appointing a commanding officer, a member of a court-martial is bad, and should, if possible, be avoided. Especially in cases where the prisoner is serving with the commander of the regiment to which he belongs, is it probable, that some

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prejudice may exist from previous, or imperfect, or *ex parte* knowledge of the circumstances inducing the trial. This, of course, applies to commanding officers of every description; that is, of posts, and detachments, as well as of regiments.

There is no prohibition by law, or regulation, to the appointment of any particular officer as member of a court-martial, and it happens therefore, at times, that officers bearing an objectionable official relation to the prisoner, are named for such duty.

Having declared an opinion unfavorable to the prisoner, *maliciously*, is a good cause of challenge. This rule of law is extended very much, and the mere expression of opinion, relative to the subject of investigation, is held to be sufficient.

Declaration of opinion unfavorable to prisoner, good cause of challenge.

It is a valid cause of challenge that a member is a material witness, and has been summoned on the trial. If a member is merely required to speak as to character, the objection is not admitted. There appear to be good reasons for this rule—and should a member, not having been challenged, after having been duly sworn, be unexpectedly called upon as a material witness in the case, he is not thereby disqualified from discharging his duty as a member of the court, though it might prove better that the character of judge and witness were not united. In a case like this, where the member is called upon to testify, and the examination, or cross-examination is of such a character, as to exasperate, or irritate the feelings of the witness, it is advisable that the member should not resume his seat; and if the number present be sufficient

It is a good challenge that a member is a material witness.

When a member is unexpectedly called upon to testify to the matters in issue, he ought to be permitted to withdraw.



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to continue the proceedings, the court may authorize, (and he may desire it,) his withdrawal. In fact, it is a safer rule, that in every case, in which a member happens to be examined as a material witness, he should be withdrawn from the court; for it is certain, that the facts to which he deposes, must, to some extent, be an expression of his opinion of the matter in issue.

Member of the same company or regiment not a cause of challenge.

The objection to a member, on the ground that he is a member of the same regiment or company with the prisoner, is inadmissible; though there are circumstances of official relation between a prisoner and his captain, or commanding officer of the company, which might authorize such cause of exception to be entertained.

Challenge to member after being sworn in.

It was formerly maintained in the common law courts, and such doctrine was stated and advocated by some military writers, that "no juror can be challenged by either party, *without consent*, after he hath been sworn, whether on the same day, or on a former; unless it be for some cause that happened since he was sworn."

But this rule, however, has been superseded by a more humane and reasonable practice, and what appears to be in strict conformity with the requirements of justice; for, as Mr. Tytler observes:<sup>1</sup> "there is no reason of justice, or of common sense, that should preclude a prisoner from challenging, on sufficient cause, any of the members *after* the court is sworn; provided, he had no opportunity of moving his objection *before* that form was gone through. An objection cannot be

<sup>1</sup> Page 231.

said to be waived, which the objector had no power of urging."

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Courts-martial will accordingly admit exceptions taken to a member, for good and sufficient cause, discovered after the member has been sworn. But if a cause of challenge, known to the prisoner prior to his arraignment, has been waived by him, it cannot subsequently be urged.

When such exception is sufficient.

Challenges to the array, are at once an exception to the whole panel or court; but such challenge is seldom offered, though it may arise from a want of competency, or jurisdiction of the court to proceed with the trial.

Challenges to the array.

The proper time for making a challenge to a member, is after the warrant for holding the court has been read, and previous to the arraignment. The prisoner first states his objections, if any, to the member, or members; and after him, the prosecutor may do the same.

Time for making the challenge.

It has been stated by a military author, (see the opinion of Sir C. J. Napier, quoted by Captain Hughes, in his work on the duty of judge advocates, at page 41,) that "when it is practicable so to do, *all challenges should be admitted*. It is not only right to be as mild as possible towards a prisoner, but it is right to let the public and the prisoner see that such is the case; besides no officer who has been challenged likes to sit as a member of a court, and it is hard to oblige him so to do, unless the good of the service demands it."

Opinion that all challenges should be admitted.

The above quotation embodies a good rule, where it is possible, consistent with the public interests, to observe it. In fact, as courts-martial are not strictly bound to the observance of

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proof of the cause of challenge, such questions must be left for determination to the sense of propriety, or sound judgment, of the court themselves.

Principle on which the sufficiency of cause of challenge is determined.

The principle, then, by which the sufficiency of all challenges is determined, is simply this, viz: that the member or juror be perfectly indifferent; and without attempting to determine the causes or circumstances which may be admitted to establish an exception made to a member, it is enough to remark, that in every instance which may arise, without recurring to particular rules laid down by any writer, the good sense of the court will always enable them to determine, whether there is probable ground for the belief, that any partial or prejudiced feeling exists in the breast of the challenged member.

Challenges not always allowed, as a matter of course, for any cause.

Now, although courts-martial are extremely indulgent towards a prisoner, in regard to this subject, and are generally disposed to allow a challenged member to withdraw, without subjecting the question to the ordeal of proof, still, it does not follow that a challenge is, of course, upon the assignment of *any* cause, to be admitted. While considerations of consequences, which may grow out of the future official intercourse, and relations of the challenger and the challenged party, have a due influence upon the minds of the court to induce a liberal rule, yet there are emergencies of the public service which demand a paramount observance, and by which, for the public interests, a court-martial will be guided.

Cause of challenge always required.

The cause of challenge must, as has been heretofore noticed, be always presented in, or re-

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duced to writing by the judge advocate, and is minuted as a part of the proceedings of the court. This rule tends very much to repress frivolous objections, founded frequently in the mere apprehensions or suspicions of the prisoner.

There is good ground for a court-martial to allow a challenge, though not supported by any proof, which does not exist for a like procedure in the courts of common law. The members of a court-martial and the prisoner are of the same profession, and likely to be called upon, in the performance of a public service, to act together: it is therefore of consequence that a perfect harmony, if possible, should exist; and that no jealousies, or resentments, or suspicions be present to mar the success of any enterprise. Limited as they are in numbers, and governed, to a considerable degree, by notions of pride and honor, it is certainly desirable that all causes should be removed, which, in reference to one another, might wound such sentiment. These causes do not exist in civil life, to introduce into courts of justice such a rule, but on the contrary, the rule now followed is necessary, for a fair and equitable division of the duties of jurors, that when one is challenged for cause, such cause should be made apparent by evidence, given in under the obligations of an oath.

Reasons why  
military courts  
allow challenges  
sometimes  
without proof.

The question, upon the admission of the grounds of challenge assigned, being decided, the court re-opens, and the decision is made known.

The parties being in attendance, the judge advocate proceeds to administer the prescribed oath, as set forth in the 69th article of the act

Oaths administered.

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of congress of April 10, 1806. After which the presiding officer administers to the judge advocate the necessary oath of secrecy, prescribed by the same article of war.

The mode of administering the oath is as follows: the members of the court, and the judge advocate stand: the person or persons to be sworn lift the right hand, ungloved, when the judge advocate recites, in an audible voice, "You, Col. A. B., Major B. C., Major D. F., and Captain G. H., (thus naming, with his rank, each member of the court,) do swear that you will well and truly try and determine," &c. &c. &c. "So help you God."

The presiding officer then administers the oath to the judge advocate, who observes the same form; during which time, all the members of the court remain standing, and observe the most decorous silence and attention.

Necessary to record the question to the prisoner; and that the court and the judge advocate were duly sworn.

It is particularly necessary, that the judge advocate should enter in the proceedings, the facts, that the prisoner was asked, after the warrant for the court had been read, whether he had any objection to any member; and, that the court and the judge advocate were duly sworn. In reference to this latter part,—

Case of Peter Clark, seaman, and decision.

It was decided in the case of Peter Clark, a seaman, that the proceedings were irregular and void, because it did not appear on record, that the judge advocate was sworn according to law. "The maxim is, that which does not appear, should be considered as not existing: and as the oath to be taken is specifically given in the act of congress, and the important duties confided to him, may determine the fate of the accused,

from the record which he keeps, it is held to be indispensable."<sup>1</sup>

So also in the case of Midshipman Guthrie, it was decided, (June 9, 1840,) for the same reason, that the omission was fatal.<sup>2</sup>

The same oath prescribed to be taken by the members of a general court-martial, is likewise directed to be taken by the members of a regimental and garrison court-martial. As there is no judge advocate appointed to officiate in the two latter, there is no particular oath of secrecy required of the recorder, who is always a member of the court, (the junior,) and is therefore bound in the same way, respecting silence, as a judge advocate would be.

Whenever several persons are to be tried by the same court, upon different charges, the court must be re-sworn at the commencement of each trial, and the record of each case made up separately, and signed by the president and judge advocate.

It is now that the prosecutor, or prisoner, should state his reasons to the court, if he desire the trial to be postponed. Unlike the practice of the civil courts, it is necessary that courts-martial should be sworn, in order to invest the members with a judicial character, and be made acquainted with the nature of the subject to be investigated, in order that they may understand, more definitely, the appropriateness of the reasons for delaying proceedings.

This motion ought, if possible, to be always made before the arraignment and opening of the prosecution; though there may be very good

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Case of Midshipman Guthrie, and decision.

Oath for regimental and garrison courts-martial.

Court to be re-sworn for every case, and record to be separate and distinct.

Application for postponement of trial.

When to be made.

<sup>1</sup> Opinions, p. 1229.

<sup>2</sup> Ibid., p. 1329.

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causes, arising during the progress of the trial, to adjourn the court, to allow the requisite time necessary to the party asking it. Such adjournment may often conduce, essentially, to a better developement of the subject undergoing investigation; and as courts-martial must adjourn from day to day, it would appear altogether proper for them to determine, by a sound discretion, whether or not, on any particular occasion, a longer adjournment would tend to the better elucidation of the subject committed to their examination.<sup>1</sup>

To delay the assembling of the court.

Application to delay the assembling of the court, from the absence of, or indisposition of, witnesses, or the illness of the party, should, when practicable, be made to the authority directing the assembling of the court.

To suspend the proceedings. Precise time to be named.

Application by either party to suspend the proceedings, may be made to the court subsequent to the swearing in of the members. The reasons assigned may be supported by affidavit, and if in reference to the absence of a witness, the court must be satisfied that the witness is material, and that the applicant cannot have substantial justice without. A precise period of time must be named, and it must also appear

<sup>1</sup> Naval courts martial cannot adjourn for a longer period than from day to day. (N. Laws, p. 66.) Such has been the interpretation of the law by naval officers. But it appears to the writer that the restriction is limited to the case of absent members only, and that therefore, whenever good reasons arise to delay proceedings, such as for instance, the absence of a material witness, or the illness of the prisoner, &c., &c., the court might justifiably, and legally, adjourn over for a reasonable time to meet the emergency of the particular case.

that there is a reasonable prospect of obtaining the witness within the specified time.

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If illness cause the absence of a witness, a surgeon may, by his affidavit, or by *viva voce* testimony, state the inability of the witness to attend; what disease; and the probable time necessary to elapse before the witness may be able to appear.

*Illness of witness. Surgeon to state his inability, &c.*

A court-martial would necessarily be adjourned at any period of its proceedings, on satisfactory proof by a military medical officer, (or M. D. in civil life, where no military medical officer is at hand,) that the prisoner is in such a state as to render it dangerous for him to attend the court.

*Court to adjourn for illness of prisoner.*

In case the illness of the prisoner should appear likely to be protracted to an inconvenient space of time, so as to operate to the inconvenience of the service, the court may be dissolved; and though the trial may have been proceeded with, the prisoner would, on recovery, be subject to trial by another court-martial.

*May be dissolved.*

In cases where a prosecutor (independent of the judge advocate) is a party, his inability to appear, either from illness or other cause, would hardly justify the suspension of the trial, except for a very limited period. And the reasons for this distinction are, that the prosecution is at the suit of the United States, and the judge advocate can assume all the duties of the prosecutor.<sup>1</sup>

*Proceedings not to be suspended on account of the prosecutor.*

<sup>1</sup> This is made the rule in British courts-martial, but a prosecutor, other than the regularly appointed judge advocate to conduct the proceedings before an army court-martial in our service, is thought to be unauthorized. (Chap. XV.)



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Courts martial  
not so ready to  
grant delays for  
the prosecution.

Where delay is asked for on the part of the prosecution, upon the plea of the absence of a material witness, courts-martial are less ready to grant it, than when at the request of the prisoner—and this not only as a principle of common justice to afford a greater latitude on the side of the defence, but also that the government can fix its own time for the trial.

Postponement  
of trial, or delay  
in proceedings  
not a matter of  
right to either  
party.

But the postponing a trial, or suspending its proceedings, upon the application of either party, is not however a matter of right; for in either case the court may, in its discretion, refuse or grant the motion.

Counsel for the  
prisoner, or  
*Amicus Curie*.

It is at this stage of the proceedings also, though it may be allowed at any time, to apply for the assistance of counsel. Courts-martial always admit counsel for the prisoner; and all military writers admit it to be the custom to allow a prisoner to have counsel. This privilege of the prisoner to have a friend, (*amicus curiæ*,) is of advantage to all—by the assistance rendered to the accused, and to the court, by frequently restraining the conduct of the prisoner.

Counsel not al-  
lowed to ad-  
dress the court.  
Communicates  
in writing.

The counsel for the prisoner (*amicus curiæ*) has a seat near the prisoner, and instructs him what questions to ask, which are written upon slips of paper, and handed by the prisoner to the judge advocate. Whatever points may arise in the course of the trial, on which remarks or arguments are deemed necessary by the counsel, must be referred to in that way in writing, as this person is not permitted at any time to address the court during its proceedings. Courts-martial have always been tenacious on this point, and to a certain extent, not permitting the

counsel to interfere in the proceedings, by remarks, or by pleading and argument, is very wise and necessary. But to manifest this caution and jealousy to such a degree, as to prohibit the reading of the prisoner's defence at the close of the trial by his counsel, though a military friend may be allowed to do so, seems to have no sufficient reason for its support. For in what way can the court be differently affected by the reading of a written argument and statement, be it by a military friend or by professional counsel, since neither language or argument can be otherwise than what such previously prepared paper contains. Indeed there exists some especial reasons for granting leave to the counsel to read this paper, inasmuch, as having composed or written it, he most likely is the most able and best fitted to read it in such a manner, by accent and emphasis, as to present its character, in a true light to the court. The only objection to be made is, where the counsel has introduced improper or intemperate language, or given erroneous impressions as to the facts in evidence, and in such a case the court or judge advocate should stop the reading of it and mark the page containing the objectionable part. As has been observed above, to allow counsel to address, or speak to the court, might be productive of inconvenience, but to prevent his reading a written defence, couched in proper language, seems to be without reason and entirely unnecessary.

There have been many exceptions to such rule, and the practice should be founded upon such exceptions. At the trial of Lieut. Col.

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Counsel may  
read the de-  
fence.

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Brant, in 1839, the defence was read by his counsel, a member of the legal profession—and such has been done in many other cases.

Prisoner's right to counsel; court competent to object to the person designated.

It matters not whether the prisoner is to be tried by a general, a regimental, or a garrison court-martial, as to his right to have the assistance of counsel. But although the court will admit this, still it is competent for them to object to the person designated, and this right on the part of the court is founded in the experience of service. It is frequently the case, that among the soldiers there are some who are known, significantly, as *lawyers*, and are apt to be very forward and troublesome persons, when admitted as counsel for their comrades. Characters of this description are much more likely to be prejudicial, than assisting, to the cause they espouse or advocate; and courts-martial therefore have wisely claimed and exercised the right of refusing their assent for the appearance of such persons. It will hardly ever occur that an objection be made to the appearance of a suitable friend for the prisoner, and the rule laid down above is only established and acted upon for the best interests of all the parties before the court.

Where soldiers may be admitted or rejected as counsel for their comrades.

Arraignment of prisoner.

The court having been sworn in the presence of the prisoner, the judge advocate reads the charge to the prisoner in open court, whom the judge advocate arraigns, by addressing by his proper title or rank, and name. "You have heard the charge or charges preferred against you; how say you—guilty or not guilty?"

Plea of the prisoner.

The prisoner may plead guilty,—or not guilty; but it must be made simply and unqualified, as

nothing exculpatory can at this time be received. No *special* justification can be offered as a plea, as such would be an anticipation of the defence. He may stand mute, that is, refuse to answer; or answer foreign to the purpose; or may plead in bar of trial.

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The general regulations for the army, in paragraph 228, say, that "In cases of enlisted soldiers, where the prisoner pleads *guilty*, and where the punishment of the offence charged is *discretionary*, including a wide range and variety of punishment, the court will receive and report in its proceedings, any evidence that may be offered in behalf of the prisoner, to illustrate the *character* and *degree* of the offence."

Evidence to be  
received where  
the prisoner  
pleads guilty.

By the above, it is perceived, that the action of the court, in such a case, is confined to the trial of an enlisted soldier, and that the evidence to be considered by them must be offered in behalf of the prisoner.

A regulation formerly existed requiring courts-martial, in all cases where the prisoner pleaded guilty, to receive evidence, so as to afford a full knowledge of the circumstances. This rule was made very frequently a question of propriety, and particularly where the prisoner, as was sometimes the case, objected to the reception of any evidence, and claimed the full benefit, as he risked the dangers, of his plea.

It is very evident that cases may arise in which it is better for the prisoner, to admit the crime as declared, upon the face of the charge, than to enter into an explanation of the incidents attending its commission, by evidence. The rule, no doubt, was founded upon consid-

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erations of justice in behalf of the prisoner, and to shield him from an undue punishment, by reason of his plea, which, from his situation, or ignorance, or any other cause, might have been proffered. While in support of the rule, it was argued to be of necessity for the information of the reviewing officer, to enable him to act with more certainty upon the sentence adjudged, and so far, in fact, to be in favor of the prisoner; it was contended, on the other side, not to be obligatory by any rule of law,—that it was a right the prisoner possessed by choosing or preferring the plea of guilty, to confine the notice of the court to the crime alleged against him, as it appeared on the face of the charge; and finally, by referring to the constitution, as illustrative of the opinion, by which (for treason, the highest political crime) a confession in open court is considered equivalent to the testimony of two witnesses.

Practice of courts-martial to warn the prisoner of the danger of such plea.

The practice now is, therefore, to warn the prisoner of the danger of such a plea, and to adduce all evidence that may tend to mitigate, or explain more favorably the conduct of the accused. In every instance of this kind, in which witnesses are produced, the right of cross-examination exists.

**Standing mute.**

A prisoner may stand mute. The seventieth article of war provides, that "when a prisoner arraigned before a general court-martial shall, from obstinacy and deliberate design, stand mute, or answer foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had regularly pleaded not guilty." And so, should a prisoner, having made objections to

the court, which were not allowed, refuse to plead, or to offer any defence, it would subject him to the same procedure as though he stood mute; and the court would proceed in the trial and pass judgment.

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In former times, in the English common law courts, standing mute brought a terrible penalty upon the prisoner, by subjecting him to the judgment of *peine forte et dure*. The manner of this punishment was, that the prisoner be sent to the prison whence he came, and put in a dark lower room, and there be laid naked upon the bare ground, upon his back, his legs and arms drawn and extended with cords to the four corners of the room, and upon his body laid as great a weight of iron as he can bear, and more. The first day to have three small pieces of barley bread, without drink; the second to have three draughts of water, of standing water next the door of the prison, without bread, and this to be his diet till he die.<sup>1</sup>

Judgment of  
*peine forte et  
dure.*

It certainly seems very extraordinary that any person would subject himself to such torture; and yet there are cases reported of such determination, and the infliction of the punishment—and the reasons for thus acting are probably to be found in a regard to their posterity, as the law, at the time, in England, in case of the suicide or conviction of the prisoner, forfeited his landed property to the crown, but in case of standing mute, it was saved to the heir.<sup>2</sup>

By the common law of England, obstinately standing mute, upon arraignment for certain spe-

<sup>1</sup> Hale's Hist. Pl. Cor.

<sup>2</sup> 4 Black. Com., 325. Note.

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Mute by visitation of God.

cies of offences, was deemed equivalent to conviction, upon which judgment followed.<sup>1</sup>

A prisoner may stand mute by the visitation of God, in which case, if it be only an inability to articulate, the court may proceed as though a plea of not guilty had been entered.

In such cases, in the common law courts, the court, *ex officio*, empanel a jury to inquire whether he stands mute, *ex visitatione Dei*. "But whether judgment of death (says Blackstone,) can be given against such a prisoner, who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined."

Plea to the jurisdiction of the court.

A prisoner may plead to the jurisdiction of the court. If a soldier was arraigned before a court-martial for a civil crime; or brought before an inferior court-martial not having cognizance of the offence charged; or if the court-martial should not be legally constituted, either as to the authority by which it was ordered, or as to the number of its members—either of these would be a sufficient cause of exception to its jurisdiction; and an officer or soldier would plead accordingly, when similar causes exist, to make the competency of the court doubtful.

Plea in bar of trial.

The prisoner may plead specially in bar of trial. A special plea in bar of trial, goes to the merits of the charge or indictment, and gives a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged.

Special pleas in bar.

Special pleas in bar, are of four kinds. 1. A former acquittal. 2. A former conviction. 3. A former attainder. 4. A pardon.<sup>2</sup> Such is the di-

<sup>1</sup> 4 Black Com., 325.<sup>2</sup> 2 Ibid. 335.

vision by the English common law ; the third, or an attainder, not being applicable to our country.

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There are other matters which may be pleaded in bar of trial ; as for instance, that the crime charged has taken place more than two years, before the issuing of the order for the trial. Now, it must be observed, that although this plea, under the statute of limitation, when made by the prisoner, is decisive, still, it does not follow that the court, upon the waiving of such plea, or at the request of the prisoner to proceed, notwithstanding, in the trial, may examine into matters said to have arisen more than two years prior to the date of the order, by which the court martial was appointed for such trial. In reference to this point, the attorney general, (July, 1820,) observed :—

Limitation of  
time under the  
statute.

The prisoner  
cannot waive  
the objection.

“ In looking into the policy of the article of war (88th,) under consideration, I do not think that it can be properly regarded as confined exclusively to the relief of persons under arrest. On the contrary, I think that its policy had a wider scope ; that the prompt prosecution of offences was considered as essential to the general discipline and moral purity of armies ; that the design of the rule was to discourage that ill judged lenity, which is so well calculated to destroy the efficiency of an army, and to prevent those inveterate animosities which find their proper nourishment only in the remembrance and prosecution of state offences.”

Policy of the  
law.

“ The rule, therefore, being bottomed on these grounds of public policy, I do not think that it

<sup>1</sup> The period within which offences may be tried by naval courts-martial is not limited.



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Court-martial  
cannot proceed  
to examine into  
offences of more  
than two years'  
standing.

is competent to any individual to waive it; or that a court-martial can proceed, even at the application of the arrested party, to examine into offences of more than two years' standing previous to the order summoning the court, unless the prosecutor can show that the party accused, by reason of absence, or some other manifest impediment, had not been amenable to justice within the time limited by the rule."<sup>1</sup>

Plea of former  
acquittal or  
conviction.

A former acquittal or conviction pleaded, must have reference to a trial by a court-martial. The same acts, as they may offend against the rights of private persons, may also violate the proprieties of military discipline, and as such, may be investigated by both civil and military courts. This is a principle perfectly well established in the military service, and has been acted upon and approved by the highest authority.

Case of Cap-  
tain Howe.

In May, 1842, Capt. M. T. Howe, of the 2nd Dragoons, was tried upon a charge for "conduct prejudicial to good order and military discipline," in having beaten, or caused to be beaten, in a cruel and inhuman manner, a private of his company. Upon arraignment, Captain Howe pleaded in bar of trial, that he had been tried and acquitted for the said act, upon an indictment of manslaughter, and the plea was duly verified by the production of the record of acquittal of the civil court. But the court-martial would not admit the validity of such plea, and proceeded to trial. Captain Howe was convicted upon the charge, and sentenced to be suspended from rank, pay, and emoluments, for twelve calendar months. The proceedings and

<sup>1</sup> Mr. Wirt. Opinions, p. 280.

decision of the court, were approved and confirmed.<sup>1</sup>

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It is also a settled principle, that a court-martial is not to take notice, *ex officio*, of a previous trial; and this rule was thus expressed in an opinion of the attorney general in 1818.<sup>2</sup>

Courts-martial  
not to take notice  
*ex officio*  
of a previous  
trial.

"The plea is the privilege of the prisoner, and if he does not use it, however the fact may be, the court will take no notice of it, so as to bar the trial. The previous trial could only be put in issue by a plea from the prisoner; and in no other way could the judgment of the court be judicially directed to it."

There seems to be a misunderstanding by officers, as to what constitutes a former acquittal or conviction. The eighty-eighth article of war declares, that, "no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence."

What constitutes a former  
acquittal or  
conviction.

Now it is clear, that the true intent of these words, applies only to such persons described, who have been legally tried, and have been legally acquitted or convicted. If the court had no right to try such persons, or such offences as were charged against them; or if it was illegally constituted; or if its proceedings were contrary to law; or the sentence unauthorized; such illegality vitiates the whole proceedings, and the prisoner must be discharged. Yet, in such a case, the proceedings had, do not constitute a trial, as they were not legally conducted, and the prisoner may, upon a new charge, be brought to trial before another court.

<sup>1</sup> General Order, No. 34, of 1842.

<sup>2</sup> Mr. Wirt. Opinions, p. 171.

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Case of Lieut.  
Gassoway.

And so an arrest, and discharge without trial, is not a good plea in bar. In the case of Lieutenant Gassoway, who was tried in July, 1819, the prisoner offered such a plea in bar of trial. Mr. Wirt, the attorney general, to whom the question was referred, said: "the fifth amendment (of the constitution,) provides that no person shall be subject, for the same offence, *to be twice put in jeopardy of life or limb*. But a mere arrest, even in cases punishable in life or limb, is not considered as constituting this jeopardy. The principle is derived to us immediately from the common law. It is a maxim of this law, "that a man shall not be brought into danger of his life more than once for the same offence;" but to give the benefit of this maxim, it is necessary that he should have been actually *acquitted*, or *convicted on a former trial*, and the record of this fact must be produced." (Opinions, page 214.)

Plea in bar of  
trial when  
good. Case of  
Captain Howe.

A plea in bar, under the statute of limitation, must be good, when a manifest impediment to trial has not existed. In the case of Captain Howe, quoted before, there was a plea of this kind made; (the offence was committed on 6th December, 1839, and the order for the court which assembled to try him, was dated 2nd March, 1842;) but the court decided, that the civil courts having taken cognizance of the offence of Captain Howe, no court-martial could assume a jurisdiction of the matters alleged against him during the pendency of the action of the civil court, and that therefore a manifest impediment *did* exist to prevent his speedier trial.

This principle, upon which the rule is predicated, has been confirmed by a formal decision, upon a like question being submitted by the navy department to the attorney general, in May, 1839.<sup>1</sup>

The opinion then given, was—as to the power of a court-martial to proceed against an offender, whilst a prosecution is pending against him before a court of criminal jurisdiction for the same offence. “I can feel no hesitation in saying, (says the attorney general,) that until he shall be discharged from the prosecution pending before the civil tribunal, no court-martial can be held upon him. Any such interference would be to place the military above the civil authority, which is wholly *inadmissible in our government*.”

In cases where the time elapsed, between the commission of the offence and the date of the order for trial, exceeds the specified and limited time, it is held, that, unless the prisoner urges it as an objection, it is not the province of the court to inquire into the cause of delay in the outset, and before the prosecutor opens the case, as such would be to assume the illegality of the order; but the court should assume that “manifest impediment” did exist, and leave the facts to be developed by witnesses in the ordinary way. Precedents of this kind, are necessarily very few—and the case of Lieutenant Colonel Johnston, cited by “Hough on Courts-martial,” at page 469, is rather a confused argument, by which the rule seems to have been fixed. However, such is proper, as it would hardly be de-

The prisoner is to plead the limitation: court to assume that impediment did exist.

<sup>1</sup> Hon. Mr. Grundy. Opinions, p. 1276

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corous in a court-martial to assume, at the outset of a trial, that the government, or functionary, from whom the order emanated, had acted illegally.

Pardon.

A pardon may be pleaded in bar of trial; as such at once destroys the end and purpose of the charge, by remitting that punishment, which the prosecution is calculated to inflict.<sup>1</sup> If the pardon is conditional, the condition must, of course, be shown to have been performed. Thus, if a soldier were charged with desertion, he might plead a general pardon by the proclamation of the president, and prove that he had fulfilled its conditions.<sup>2</sup>

Courts bound to investigate all matter legally presented to them.

How far a court may legally decline to investigate a charge against an officer or soldier, for which the party has been previously arrested, or punished, and afterwards released, is by some considered doubtful. Instances of this kind have been approved, as in the case of Captain G. J. Halliday, of the 10th regiment of foot, quoted by Simmons, page 181. I am of opinion that a court cannot reject a charge on this ground. It may be a sufficient reason for them to affix a mitigated, or declare no punishment at all; but when matter, legally cognizable by a court-martial, is referred to them for investigation by competent authority, they are bound to act upon it, and proceed with the trial.

If a commanding officer, or other, should by law be empowered, (as is the case in the navy,)

<sup>1</sup> Black. Com., 337.

<sup>2</sup> Such a proclamation was made by the President after the termination of the Black Hawk War in 1832, when many soldiers deserted from dread of the cholera.

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to inflict a certain kind and degree of punishment for some offences, and this power should be exercised, then as discipline thereby has been duly vindicated, there is no doubt, that a plea in bar, under like circumstances, would be sustained; and of course the preceding paragraph, in which the right of the court to entertain such a plea is denied, does not apply; that is meant to refer to cases of mere arbitrary or discretionary punishment at the mere will of the officer, without the recognition of law.

An arrest of an officer, or the connement of a soldier, from which the party has been released, would not therefore be a bar to trial in all cases, as there might exist, or be discovered, very substantial reasons for a prosecution of the offence before a court-martial. Yet the imposition of an arrest, or other exercise of authority, as a mere arbitrary punishment, without an intention on the part of the superior officer to call for a trial, would be a cause of just complaint, though it could not intervene as a reason to prevent a trial, but would very justly be considered in the apportionment of punishment.

The previous arrest of an officer or soldier not always a good plea in bar.

The prisoner, on being arraigned, may plead to the want of definite specification in the charge, as to matter, or to time, where time is an essential part of the offence; or in order to fix the identity. The objection urged would necessarily be, that the specifications were couched in terms too vague, to admit of a pointed or particular defence, and that, should another prosecution be urged against him, he could not consistently plead that he had been previously tried for the same offence.

The prisoner may plead the want of definite statement in the charge.

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This objection, however, if the prisoner should prefer so to do, might be put off until the defence, or be made the subject of observation subsequent to pleading, since the prosecution would in course identify the facts upon which the charge was based, and therefore save the prisoner from a second trial on charges built on those facts. A total want of specification in the charge, can undoubtedly be urged as a sufficient reason for declining all defence, and would render the proceedings nugatory, or harmless to the prisoner, as no sentence, under such circumstances, could be maintained. The same technical nicety which courts of civil jurisdiction observe in criminal cases, is not desirable or necessary in the proceedings of a court-martial; and exceptions made to form or matter, are only admitted by them when such appear essential to abstract justice. When such objections ought to be made by an officer, must depend upon his own sense of propriety, and what is due to the vindication of his reputation; for it must be supposed, that in cases where the charge implicates the honor of the accused, he would not desire to postpone, or avoid a trial, by raising a mere technical objection to the form or language of the charge.

When the special plea is reasonable, procedure of the court.

If the special plea in bar be reasonable, or plausible, though there should exist no precedent for the guidance of the court, it is proper that the court should hear evidence on the point raised; and if the plea be received as valid, the court would adjourn, having committed to the record all the facts of their proceedings, and sub-

mit such record to the authority by which the court was assembled.

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A plea in abatement may be offered, but as such is merely dilatory, there can no essential benefit flow from it for the prisoner, and therefore, when there is ground for such plea, (which can very rarely happen,) as for a misnomer, or false addition, it is competent for the court to permit the error to be amended, upon the declaration of the party; "for it is a rule upon all pleas of abatement, that he who takes advantage of a flaw, must, at the same time, show how it may be amended."<sup>1</sup>

Plea of abatement.

There is another plea, known in the civil courts as a *demurrer*, which admits the truth of the facts charged, but denies the inference as alleged by the charge—that is, "the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is not" mutiny, or disobedience of orders, or conduct unbecoming an officer and a gentleman, &c.; this plea need not be made, and a court-martial would not admit it, as all the advantages of it may be taken on a plea of not guilty.

Demurrer.  
Courts-martial do not admit such plea.

It is not a good plea in bar of trial, that the prisoner has not been furnished with a copy of the charges, or that there is a variance between the copy furnished him, and the one upon which he is arraigned. Such objection can only operate to delay the proceedings, as the court would, undoubtedly, under such circumstances, if the difference between the copies of the charges was

Not a good plea for the prisoner that he has not a copy of the charges, or that there is a variance, &c.

<sup>1</sup> 4 Black. Com., 334.



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The ordinary plea, is not guilty. Witnesses retire until called for.

Prosecutor to be first examined.

Persons who hear the testimony of other witnesses are not thereby made incompetent.

material, allow a proper time for the prisoner to prepare himself to meet the charges.<sup>1</sup>

The ordinary plea offered is, "not guilty," upon which the trial proceeds. The plea being recorded, the judge advocate calls the first witness, and gives notice, that should there be any persons present in court who have been summoned as witnesses, they will retire until called for, as it is a rule, that the witnesses of neither party can be present during the examination of other witnesses.

In cases where a prosecutor<sup>2</sup> is appointed, or appears before the court, who is also a witness, it is necessary that he should be the first examined, though the fact of having been present during the delivery of the testimony by others, would not preclude him from being called again by the court, should circumstances render such a course necessary. It is, of course, much better that his examination should be so full as to render such procedure uncalled for. It may likewise happen, that a person has heard all the evidence given in, and be afterwards cited as a witness in the case. This cannot make such person incompetent, though, according to circumstances, the character of the witness, &c., it might affect his credibility. It is seldom, however, in trials before military courts, that such an

<sup>1</sup> The 38th Article of the Rules for the Regulation of the Navy, provides for any different matter which may be alleged against a prisoner. (Homan, Naval Laws, pp. 65, 66.)

<sup>2</sup> The case of a prosecutor being permitted to appear, has been previously remarked upon as inadmissible, and the author has inserted the provision above referred to, and in other places in the course of this work, in order that the distinction, and objections in all such cases, might be more clearly understood.

occurrence has place, as the witnesses are generally well known, and are duly notified to attend, previous to the meeting of the court.

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The judge advocate, or person appointed to prosecute, may, at the opening of the trial, make such statement or view of the evidence as he thinks expedient, being careful, at the same time, that the language employed by him is perfectly respectful to the court, and applicable to the charges. No insinuation of imputations not implied by them, would be becoming; and all reproachful words to a prisoner are to be avoided.

Judge advocate may open with a statement of the case. Language to be proper.

This method of opening the trial is not, however, customary with courts-martial in the United States army; but the address is deferred until the evidence has been rendered and recorded, and the defence made. It thus appears in the form of a "reply," and embodies the whole subject.

This method not usual in the U. S. service. Address generally deferred.

Should the case to be investigated, be rendered difficult by many circumstances and facts connected with its history, the judge advocate might find it convenient perhaps, in order that the court might better appreciate the testimony as it is given in, to make a statement of it before the witnesses are introduced; but in ordinary cases, such a course is hardly necessary—and it is therefore not usually resorted to.

The witness is sworn by the judge advocate,<sup>1</sup>

<sup>1</sup> 73rd Article of War. The law does not direct by whom the oath shall be administered; but the custom of courts-martial has fixed the practice, and the judge advocate does so. Before naval courts-martial the president is required and authorized by the statute to swear the witnesses. (37th Art., N. L., p. 65.) It is a remarkable fact, that at the trial of Commodore Barron, in 1807, the witnesses were sworn by the judge advocate—of course there was no judicial oath taken, and consequently no valid evidence heard!

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VII.Witness sworn  
by judge advocate.Of the corporal  
part of the  
oath.

and the same form of administering the oath is observed as was indicated for the swearing in of the members. This form is to be observed, with the language prescribed by the article of war, as a means intended to ensure uniformity in the mode of administering the oath, particularly in regard to military witnesses under the articles of war. Where this mode conflicts with religious principles or scruples, arising from peculiar sectarian opinions to which the witness may adhere, the ceremony of swearing must be performed in the way which the individual, according to his faith, may deem most binding on his conscience. Thus a quaker affirms, which is provided for by the law. Among the variety of christian sects, various modes are observed. A protestant holds up the right hand, or kisses the book. A catholic is sworn upon the cross, which he kisses. And Mahomedan, and Pagan nations have their own peculiar ceremonies, which are observed as occasion may require in the courts of civil judicature. No particular form is essential, except for military witnesses, and then the words only are prescribed—the corporal part of the oath, that is the particular action, is left to custom.

The name, rank, regiment, or corps, or distinctive condition of the witness is recorded by the judge advocate at length, so that the person may by the description be easily identified.

Examination of  
witnesses.

The examination of witnesses is always in the presence of every member of the court; and the "countenance, looks and gestures of a witness," are considered of importance as adding to, or taking from the weight of his testimony.

The manner of a witness when delivering his evidence, may certainly in most cases indicate the feeling which animates him, and so far enable the court to judge of his fairness or disinterestedness in the matter at issue.

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The testimony is sometimes given in the form of a narrative, but more frequently by interrogation. Narration in many cases is the most natural and easy method to observe, because circumstances and facts are detailed in the order of time, and presents to the mind of the hearers a consistent statement—perhaps, too, the connected order of its recitation may afford some means to judge of its fidelity. Interrogation is the more direct and searching means of eliciting evidence, and also the more certain.

Testimony  
given in narra-  
tive, or by in-  
terrogation.

All evidence received is recorded in the order in which it is given, and as nearly as may be in the very words of the witness.

All evidence is  
recorded in the  
words of the  
witness.

This last rule has not always been sufficiently attended to, and its importance may be better appreciated by a little reflection thereon.

From the diverse condition of persons who are called upon to testify before courts-martial, it sometimes is the case that some of them do not properly appreciate or understand the true import and force of language. Hence it happens that terms or even phrases are used by them which are in fact interpreted by the court in a sense different from that in which the witness used them, and this as a necessary consequence, leads to error and injustice. But by making a record of the precise words used, and not leaving to the interpretation of the judge advocate, to express the meaning of the witness in other

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terms,—and thereby presenting to him and the court the exact words employed in the order of their delivery, this danger is greatly obviated—not only by calling up some reflection in the mind of the witness as to their true signification or his understanding of them, but by presenting frequently in the course of his statement, a contradiction in terms. This necessarily leads to explanation and a proper application of the testimony. Should, however, the judge advocate use his own language to express what he conceives to be the meaning of the witness, and thus preserve consistency in his declarations—the particular language employed by the witness might escape the memory of the court, and in that way tend to the perpetration of error.

Witnesses to be  
confronted.

Although the rule is fixed that no witness should be present in court during the examination of another witness, yet it may happen that from opposing statements by adverse witnesses in relation to the same facts, the court may at times find it necessary to confront them. This of course is an exception which necessity imposes.

Court may adjourn to the room of a sick witness.

In case a witness should be too ill to attend the court, the latter may adjourn to the room or bedside of the former to receive his evidence. No part or number of the court can be delegated to receive such evidence, but the *whole court* must attend for that purpose. This rule supposes that the witness to be examined is at the place or post where the court has been ordered to assemble.

The seventy-fourth article of war, provides for the reception of evidence, in cases not cap-

ital, by the deposition of witnesses, not in the line or staff of the army. This deposition may be made before a justice of the peace, provided the prosecutor and the person accused are present at the taking of the same, or are duly notified thereof.

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Depositions by persons not in the line or staff of the army.

"The 74th article of the code, [army,] by providing under certain restrictions, and in cases not capital, that depositions may be taken, negatives their allowance in other cases; and the existence of the provision sufficiently proves that without it, such testimony would not be competent, even in those minor cases."—[Attorney General's opinions, p. 763—June, 1830.]

The provision of law above is confined to non-military persons. Members of the army may be compelled to attend the court-martial; but as there is no compulsory process to bring other persons as witnesses before a court-martial, their testimony may be given by deposition before a justice of the peace.

The absence of authority to compel the attendance of witnesses not of the line or staff of the army, may be considered under many circumstances a very singular defect, and oftentimes highly prejudicial to public interests, as well as dangerous to individual reputation. The jealousy which exists in relation to the exercise of military power, is founded certainly in substantial reasons, but where the administration of justice by legally organised courts is hindered by the force of such sentiment, there can be no doubt of its having an unnecessary and hurtful influence. Why military persons should be debarred of a right and privilege, guaranteed to

Remarks upon the want of compulsory process to compel attendance.

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all other citizens by the sixth article of the amendments to the constitution, is not perceived; and it is very clear that a compulsory method of obtaining the testimony of citizens, to be used in military trials, might easily be determined without wounding any principle of government or right of persons. Trials by courts-martial involve the highest interest known to society, to wit:—those of life and honor, and should not such be guarded by every reasonable and necessary means ?

This is a proper subject for reflection, on the part of our legislators, and one of great interest to every soldier: and it is hoped that many years may not be permitted to pass before suitable notice shall be taken of it.

Objectionable  
to read over the  
charges to wit-  
ness.

The custom has prevailed, almost without exception, of reading over the charges to the witness previous to commencing his examination. A little reflection must present this mode, in many cases, as being very objectionable; and that, inasmuch as it presents the particulars, of time, place, and words to the notice of the witness, it instructs him in the matter to which he has been called to testify. The nature of the charges, and the character or standing of the witness, may very much, at times, determine the propriety of this course: and, wherever the reading of the charge may have the effect of a leading question, it should be omitted. When particular words, alleged to have been used by a prisoner, have been inserted in the charge, as in cases of disrespect, &c.; such words, upon reading the charge to the witness, should be omitted, as the prisoner might, with great pro-

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priety, object to their enunciation. It is, of course, difficult to distinguish cases in which this mode should be observed or omitted. Each particular case, and the language of the charge, will indicate the best way of proceeding in the examination. Questions may be framed in such a form as to enable the witness to narrate all the circumstances of the case. In the civil courts, upon criminal prosecutions, the indictment is not read over to the witnesses, and where no form is prescribed by law, the analogy of procedure in the civil, may be safely referred to by military courts. The safe rule to observe is, that whenever the reading of the charge does not, as a leading question, instruct the witness how to answer, or make known to him the essential minute facts of the charge, it may be read to him ; and, more particularly so, if, under such circumstances, it tends to shorten the examination. The preparation of numerous written questions is a very tedious proceeding, and it probably is one cause why the charge has been read to the witness so generally, and he requested to state at once all the knowledge he may possess of it. It is a convenient method in most cases, but wherever there is a suspicion of prejudice, or doubt of credibility, the safest mode is to proceed by interrogation.

Rule for the examination of witnesses.

Questions are reduced to writing by the party originating them, and read aloud by the judge advocate, who enters them on the proceedings. Should an objection be made to a question on enunciation, the court is cleared, and a majority of voices determines whether it shall be put or not. A question having been rejected, is not,

Questions reduced to writing. How disposed of.



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therefore, expunged from the record, of which it makes part, unless by consent of the parties before the court, but appears on the record, with the decision of the court. It sometimes happens that a question when propounded by one of the parties, or a member of the court, appears too objectionable to be read in the hearing of a witness; in such case, it is manifestly the duty of the judge advocate to ask to have the court cleared, before it is announced, and then state the objections to it. This is a means of preventing a witness from being instructed, or led in the course of his evidence by improper questions, though they are not permitted to be answered.<sup>1</sup>

Questions by the court cannot be objected to by either party.

A party before the court cannot object to a question put by the court, though he may to a question put by a member of it, before the collective opinion of the court has been expressed in relation to it. All questions originating with members, and which have been received, are recorded as "*by the court*," but when made the subject of discussion, and rejection, they are entered upon the record as "*by a member*." The reception of a question by the court, originating with an individual member, makes it a question by the court; but where rejected, in

<sup>1</sup> The form observed before naval courts is to hand the question to the president for examination. This practice seems to be drawn entirely from the practice of English naval courts, where the president enjoys and exercises powers and rights not conceded in the United States service. There is no legal or necessary cause for the observance of such procedure, and as it tends to lengthen the trial, and to make wearisome and tedious the proceedings of the court, without indeed fulfilling any beneficial purpose, it is better that it be discontinued.

order to save a contradiction in the record, it is necessarily written down as *by a member*.

When a witness is sworn, the party who calls him commences the examination, which is styled the examination in chief; that being finished, the opposite party asks what questions he may deem necessary, and this latter interrogation is called the cross-examination.

A re-examination of the witness, by the first party, follows the cross-examination, upon such points as the latter may have touched on, and then the court put such questions as they may deem requisite, to elicit the whole truth, calling for explanation of previous portions of the testimony, or requiring a fuller statement of circumstances or facts, which had been but slightly referred to. A court-martial has certainly the right to put questions to a witness at any stage of the examination, but such a course has many inconveniences, and frequently confuses the proceedings; it perplexes the mind of the party, and may, to some degree, derange his pre-conceived order of examination. It is much better, therefore, that the examination by the parties should be completed before the court make any interrogation; and thus it frequently occurs, that the necessity of asking any questions is obviated by the first examinations. Members of courts-martial should bear in mind, that though the course and method of the examination by the parties may appear defective and prolix, and, therefore, fatiguing, yet that every person has a particular mode in view, and is proceeding to results, which, to those who merely listen, may not, at the time, seem to have any connection

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The party who calls a witness begins the examination. Examination in chief.

Cross-examination.

Re-examination.

Parties to finish their examination before the court puts any questions.

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with the means; and that nothing can have a more depressing effect upon the mind of the party, or give rise to more painful and embarrassing feelings, than the abrupt interruption of his plan, by any manifestations of impatience on the part of the court.

Evidence to be  
read over to  
witness.

The examination of a witness being completed, his evidence, if deemed necessary by the court, or if desired by him, is read over previous to his leaving, to give him the opportunity of correcting any errors therein.\* Accordingly, any remark or explanation, with such a view, is entered on the proceedings; but no erasure or obliteration of what has been previously stated can be made, as it is a matter of propriety and necessity that the reviewing officer should have presented to his notice every item of the proceedings, and to enable him to judge of every thing which has been done by the court, or which may be made the subject of remark by the parties.

No erasures or  
obliteration of  
the record al-  
lowed.

All matters which have once been presented to the court, as a part of the statements of a witness, must have, or may have some operation on the minds of the members, though such matter may have been subsequently amended, or explained; it is but just, therefore, that the same should be presented to the observation of the revising authority. Immaterial matter, which has been offered by inadvertence, might be, the parties not objecting, expunged from the record; but courts-martial should be cautious in allowing this, as objections, or questions thereon, might, at a subsequent period to the dissolution

of the court, be raised, and be productive of ill consequences.

Should either party perceive, after having concluded his case, that a material question had been omitted, he submits it to the court, who will always allow it to be put. This is conducive to the ends of justice, as well as satisfactory to the individual asking it, and is believed to be perfectly in accordance with the rule observed in the civil courts.

Reading over the testimony of a witness previous to his leaving the court, and after he has finished his statement, is a very useful rule, and often may prevent a subsequent perplexing explanation. But the testimony of a witness should not be read to him during, or previous to his cross-examination: such a course might defeat the very ends and purposes of a cross-examination.

The opposing party to the one calling a witness, has the right of cross-examination: and so, should the prisoner, having cross-examined a witness, and subsequently call the same back to be examined for the defence, it would be held to be an examination in chief, and the right of cross-examining the witness could be claimed by the prosecutor.

The witnesses called by the prosecutor having been examined, and all the evidence to substantiate the charges submitted to the court, the prisoner enters upon his defence. Should it be necessary for preparation, the court, at the request of the prisoner, would grant time to enable him to proceed with more certainty or precision.

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Questions by a party put through the court after he has concluded his case.

Testimony of witness not to be read during or previous to his cross-examination.

Opposite party may cross-examine.

The prosecutor having examined his witnesses, &c., the prisoner begins his defence.

Court may grant time to the prisoner.

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The prosecutor must produce all his evidence before the prisoner begins his evidence.

It must be distinctly understood, and observed, in the conduct of all military trials, that the prosecutor must, during the prosecution, and before the prisoner comes on his defence, produce *all* the evidence he has to support the charge. After the prosecution has been closed, which must be announced and entered upon the record, no further proof in support of any alleged specific fact in the charge can be received.

The adherence to this rule is not only necessary, to preserve a congruous method in the development of the proof for the prosecution, but also to guard against any advantage being taken of the prisoner, after the method and means of his defence have been revealed.

Witnesses for the defence are examined.

Witnesses for the defence are examined in the same order as those presented on the part of the prosecution. The prosecutor cross-examines, and the prisoner re-examines to the same extent allowed to the prosecutor.

Prisoner's address to the court.

The examination of witnesses being closed, the prisoner takes this time to address the court, when, by argument and statement of the facts as shown in the evidence, he presents to the court every consideration which may tend to weaken the force of the prosecution. The greatest liberty, consistent with a strict propriety, especially in regard to third persons not before the court, is at all times allowed a prisoner: and he therefore may impeach, by evidence, the character of witnesses brought against him, and remark on their testimony, and the motives by which they and the prosecutor appear to have been actuated.

Yet in the indulgence of such a course, it must

be remembered, that coarse and insulting language cannot be tolerated. The most vigorous defence is not at all incompatible with refinement of language and propriety of demeanor; and an accused person should be well assured, that so far from helping his cause, that coarse epithets and vulgar imputations, will most assuredly operate to his disadvantage. The court itself would, too, feel bound to interfere and check a prisoner, who should thus forget what was due to himself and others, and state to him, if necessary, that the course he was pursuing would not weigh with them, or operate in his favor.

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Insulting language not permitted in the prisoner's address. Interference of the court.

Should either party, in the course of their examination of the witnesses, or by bringing forward new ones for that purpose, introduce new matter, the opposite one has the right of calling other witnesses to rebut such new matter. A prosecutor cannot be allowed to bring forward evidence to rebut what has been elicited by his own cross-examination, but must be confined to new matter introduced by the prisoner, and supported by the examination in chief of the prisoner.

New matter may be rebutted by opposite party.

The address of the prisoner, prepared subsequent to the reception of all the testimony, is read by the prisoner, or if any cause should prevent his so doing, it may be, at the request of the prisoner, read by his counsel, the judge advocate, or a military friend.

Prisoner's address, by whom read.

The restrictions against professional counsel in this respect, is not, in the army of the United States, urged so tenaciously, as seems to be the case in trials before courts-martial in the British

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VII.

army ; and in point of propriety, the indulgence granted to prisoners, on this part of their trial, may be said to be supported by good sense. Lawyers, technically as such, are not recognized by courts-martial, though permitted to appear as a friend, to assist the prisoner with advice in the conduct of his defence ; and therefore it is, that interruptions by nice distinctions or pleadings, orally, are not permitted. Such pleadings, too, would be entirely out of place, and tend to no good result, but on the contrary would embarrass by delays the business of the court. These objections, which are substantial, when applied to the business of the trial merely, ought not to have any weight, in considering the propriety of permitting the counsel to read the address—as it is very certain that such privilege cannot be urged as precedent to procure other indulgence, nor affect in any way, prejudicial to the service, the proceedings of the court.

Judge Advocate's right to reply.

The judge advocate, or the prosecutor, can always claim the right of replying to the defence of the prisoner, and the court will generally grant a reasonable time for the preparation of it. When the reply has been read the trial is closed. Should the prisoner have examined witnesses to matter not touched upon in the course of the prosecution ; or should he have reflected upon the credibility of the prosecutor's evidence, the prosecutor is allowed to examine witnesses to the new matter, and for the re-establishment of the character of his witnesses ; and the court will be particular to confine him, in his further examination, to the new matter introduced, as he cannot be allowed to examine on any points,

When the prosecutor is allowed to examine other witnesses touching new matter.

which in their nature he might have foreseen previous to the defence of the prisoner.

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What is new matter must be judged of by the court, and the facts of the testimony will enable them to judge correctly. For instance a prisoner might allege and produce evidence to show that he was compelled to do a certain act by others, or that he omitted the performance of some duty from unavoidable accident or severe disease. This defence, as it could not have been foreseen by the prosecutor, or at least it ought not to be assumed, that he might have anticipated it, would admit of the examination of witnesses to counteract it, or the production of other legal evidence, as might be necessary.

What is new  
matter.

Cross-examination of such new witnesses, according to the extent of the examination in chief, is permitted to the prisoner, to whom, when witnesses are introduced in the reply, a rejoinder is allowed; but he is not permitted to call other witnesses, except to fortify the character or credit of such of his witnesses, as may have been impeached by the prosecutor in his reply. To an extent, determined by the arguments of the prisoner in his rejoinder, is the prosecutor allowed a second reply—which is called a sur-rejoinder.

Cross-examina-  
tion of new  
witnesses. Re-  
joinder—sur-  
rejoinder.

But these various addresses to the court, are very seldom called for, and are quite unusual; though cases may occur in which the parties deem it advantageous to claim and exercise the right.

Such addresses  
seldom made.

Pleas in bar of judgment are seldom or ever made—all such matter would be embodied in the defence. The pleas and excuses which

Plea in bar  
of judgment.



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protect the committer of a forbidden act from punishment, are confined to the want of, or the defect of, will.

Lunatics. Misfortune, or chance, ignorance. Mistake in point of law no defence.

Lunatics are not criminally chargeable for their acts, while laboring under such incapacity. So misfortune, or chance, and ignorance in some cases, may excuse the unlawful act of a man. But a mistake as to a point of law, is no sort of defence. And ignorance of the military law, or the rules and regulations, which it is the duty of military men to be acquainted with, is not admissible as an excuse for the non-observance of them.

Ignorance, when an excuse.

The ignorance which is spoken of above as being at times an excuse for the act, is a defect of the will—as where a man intending to do a lawful act, does that which is unlawful, as for instance, where one intending to kill a robber or house-breaker, kills an innocent person—such an act would not be criminal.

Compulsion, or inevitable necessity.

Another plea, and which is one of importance to be understood, as it may frequently in military trials be brought in question, is that of compulsion or inevitable necessity. “These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which it is presumed his will (if left to itself) would reject. As punishments, therefore, are only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.”<sup>1</sup>

This plea when founded upon the obligation

<sup>1</sup> 4 Black. Com., 26.

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Obligation of  
subjection to  
military au-  
thority.

Hesitancy—  
disobedience of  
orders.

Illegal orders  
not obligatory.

Difficulty of  
distinguishing  
what are illegal  
orders.

ly present  
r it is a nice  
r may plead  
he order of a  
prove to be il-  
tating to yield  
the presumption,  
These questions,  
courts-martial, are  
to military discipline,  
as a consideration of  
efore, courts-martial  
the principle of excul-  
Hesitancy in the ex-  
der is clearly, under most  
ous offence, and would sub-  
penalties; but actual dis-  
which the law has stigma-  
est degree, and against which  
extreme punishment of death;  
an offence of this nature, from  
er which might result from it,  
y nicely scrutinized by courts-mar-  
stification would be admitted upon  
that there was no lawful authority  
mand given.

inciple of conduct is, that illegal orders  
obligatory.<sup>1</sup> This must appear as a con-  
e to the purposes of military service,  
at all orders are given in furtherance of  
objects contemplated by the laws, creating  
governing the military establishment. But  
difficulty of distinguishing, at times, whether  
Order is illegal or otherwise, and the degree

<sup>1</sup> 9th Article of War.

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VII.

of illegality which characterizes it, must make a decision on this subject always doubtful and dangerous, when a refusal to act is to follow it. To disobey an unlawful command of a superior is undoubtedly lawful; but this must be understood, for its true and practical intent, to be limited to such orders as are plainly and palpably in violation of the well known customs of the army or the laws of the country, and not in cases in which the question of legality is merely doubtful or undecided. In every case then in which an order is not clearly in derogation of some right or obligation created by law, the commands of a superior must meet with unhesitating and instant obedience. The necessity of military obedience is so apparent, that in cases in which the question of right might be brought for adjudication before the ordinary courts of law, it cannot be supposed that the latter would hold a soldier very strictly responsible for an act resulting from obedience to an order which was "not in itself so glaringly opposed to all law, as to be apparent without reflection or consideration."<sup>1</sup>

The particular cases, in which disobedience may be justified on the plea of unlawfulness of command, is of difficult ascertainment, and must be considered and judged of in connection with the necessity of military obedience.

Compulsion by  
menaces—fear  
of death.

There is also a species of compulsion or necessity which arises from "threats or menaces, and which induce a fear of death, or other bodily harm, and which take away, for that reason, the guilt of many crimes and misdemean-

<sup>1</sup> Simmons on Courts-Martial, 207.

ors."<sup>1</sup> This sort of compulsion may be pleaded in cases of mutiny and rebellion by soldiers; but it must be understood that the fear which induces to such acts, must be just and well grounded, and not proceed from a too easily alarmed imagination; and this force and fear must continue too, all the time the party remains with the mutineers. The cases showing the degree of compulsion which may excuse criminal acts, cannot of course be defined, but the law is certain in its principle of judgment, and while a strict regard from motives of policy and necessity is expected from the soldier to military commands, it sets a limit to that observance of them, which runs into the extremes of a blind obedience, to the great peril of the individual, and the state.<sup>2</sup>

<sup>1</sup> 4 Black. Com., 29.

<sup>2</sup> Captain Hough, at p. 364, gives a case in illustration of this subject, which is also quoted by Captain Simmons, at p. 209, as follows:—"In 1813 a sergeant (a German) of H. M. 60th regiment of foot, who had originally deserted from the *French*, entered *that* regiment by a voluntary enlistment. On the advance of the army, under the Duke of Wellington, into Spain, he was taken prisoner by the *French*. To save his *life*, forfeited by the act of *desertion*, he entered into the *corps des étrangers*, set apart in the French service for such men, as an inducement to them to return to it. At the battle of Vittoria, he was again taken prisoner by the English, and a general court-martial was ordered to try him for desertion. The first sentence acquitted him of the act of *desertion*, there being the powerful inducement to the act, that of saving his life; but the sentence was revised, and it is stated that on revision, he was sentenced to suffer *death*, and was afterwards shot in the presence of that division of the army to which he belonged. I also understand that it was intimated to the above court that the excuse pleaded by the prisoner was inadmissible, as he should have preferred death rather than to have entered the service of the enemy."

In the above case there seems to be some confusion in the statement of the facts. If the prisoner was tried for *desertion*, it is

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## Insanity.

Among the decided and indisputable pleas of excuse, is that of insanity ; which, of course, by rendering the unfortunate person irresponsible, remits all punishment. But if the lunatic has intervals of reason, sufficient to permit him to distinguish the moral bearing of his actions, and such powers of intellect as to enable him to restrain his passions, by which he was excited to crime, he must be held to answer for his behaviour during such intervals.

Drunkenness  
not considered  
by the law as  
an excuse.

Drunkenness, or intoxication, is a species of madness ; but as it is produced by the voluntary act of the person, it cannot be held to excuse criminal acts. Indeed, the law, strictly speaking, considers it rather as an aggravation of the offence. The necessity of considering intoxication as no excuse, arises from the ease with which such condition may be assumed or feigned, and not to permit one crime to be pleaded as a privilege or justification for another.

## Exemption.

Thus it is seen, that according to the principles of legal judgment, no palliation of an offence is admitted on account of intoxication ; and yet, from the habits of soldiers, and the character of offences most frequently perpe-

clear that the plea of the fear of death had induced him to enter or reënter the French service, was no excuse for the act, and the finding and sentence of the court were legal ; but if the prisoner was arraigned for entering the enemy's service, considered (constructively) as an act of desertion, it is manifest that his plea ought to have been received, for his conduct in that particular had been induced *pro timore mortis*, and he was therefore excusable.

During the war of 1812, many of our seamen were similarly situated by impressment in the British navy—which, if to serve there against their country, had been a crime by the laws of the land, making them amenable to trial and punishment, would have been a legal justification.

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trated by them, it is difficult, not to consider such maxims as opposed to humane reason. Where there is no certain, or apparent predisposition to commit the offence charged against a prisoner, and where its enormity is not such as to shock the sentiment of humanity, courts-martial do at times consider this excuse as having some right to consideration ; though it must be remembered, that it is only received in extenuation, (if at all,) of the smaller and lighter offences.

Voluntary drunkenness is a vice, which brings in its train countless evils. In military life, as in the civil walks of society, crime follows its footsteps, and introduces disorder and insubordination, which require all the severity of law to check or suppress. There are, indeed, few offences in the army, in any degree aggravated, which do not proceed from the indulgence of this vice ; and expences and inefficiency are thereby entailed upon military commands, to the great detriment of the public service.

Evils of drunkenness to the military state.

It is gratifying to know, however, that a happy change in regard to this habit, has been gradually making way among the private soldiery, within a few years past, and it is hoped, that sufficient inducement may be offered to stimulate the weak against the approaches of so dreadful an enemy, and reclaim the fallen from its fearful dominion.

Habits of the private soldiery undergone a beneficial change.

If the healthful example, offered by the officers of the army, to the men subject to their control, may be, in relation to this subject, deemed a means of preventing the introduction of and indulgence in the vice spoken of, there is then, from this cause, much to rely upon.

Healthful example of sobriety in commissioned officers.

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The severe judgments which courts-martial are disposed to pronounce upon delinquencies of this nature in the case of commissioned officers, have restrained young men from excess, and preserved them from the moral impurity of such offences. But this is not the only influence which has been active for their preservation. A high intelligence, a fixed standard of morals, derived from and impressed by the judicious cultivation of their faculties during the probationary term of study at the military school at West Point, exert a paramount power over them for the conservation of all the proprieties which should attach to their condition in life as citizens and soldiers.

The importance  
and advantages  
of the military  
academy.

It is, emphatically, to the military academy, since the period when it attained sufficient vigor of administration and means of instruction, to supply the annual vacancies in the several regiments and corps of the army, that the high qualities in morals and in mind, which have distinguished the body of military officers must be ascribed.

With benefits flowing from an institution of learning, not only estimable in the profession for which its pupils are trained, but eminently advantageous to the community at large, by the diffusion of scientific knowledge so important in the practical labors of our country, it is remarkable that such vehement opposition as has at times, been manifested to its continuance, should have been made. Yet political proscription and individual resentments have been enabled, by specious, though unsubstantial imputations

<sup>1</sup> Since the year 1816.

...city of its government, to agitate  
 ...its abolition, and which required  
 ...ness and intelligence of disinterest-  
 ...the legislators to resist and over-



## CHAPTER VIII

### FINDING.

#### CHAPTER VIII.

Decision of the  
court.

Every allegation  
of the  
charge to be in-  
vestigated.

THE charge having been investigated by the production and examination of all the evidence, which the parties have deemed necessary, it is now the business of the court to decide upon the question of guilt.

It is necessary, however, before proceeding to this stage of the trial, that each and every allegation made against the prisoner should be fully inquired into; and this too entirely without reference to the proof of any one item, which might even call for the uttermost sentence which a court-martial can award, either against the life, or the commission of the offender:—and, so too, must a distinct judgment be pronounced upon every specification adduced in support of the charge.

It is not, therefore, sufficient that, upon the finding of guilt of the more aggravated portions of the accusation, the court should rest satisfied with such proof, and omit further investigation of the remaining portions, but will continue its inquiries until the whole of the accusatory matter has been sifted. This is apparent, if it is considered that courts-martial in their judgments sometimes commit errors, in regard to evidence or the just consideration of the offence, technically considered, under the specification of facts,

and, therefore, an omission on their part to fully examine and decide upon the entire charge, or charges, and specifications, would be productive of delays, and hindrances to the service, as well as, in many cases, be highly prejudicial to the party tried, as tending to prevent a declaration of his innocence of the offences imputed, and thus freeing him from the censure and partial judgments of the public.

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Every member should fully satisfy himself of the extent and value of the testimony on record; and, for this purpose, a fair copy of the proceedings is laid upon the table, or read over by the judge advocate, for the convenience of reference, and to make certain, while the subject or particulars of the evidence is still fresh in the minds of the members, that such copy is a faithful transcript of the same. This is of importance where the case is intricate, or the testimony voluminous; and it is also a very useful practice for the judge advocate, in such cases, to prepare an index, or short notes of the evidence, in order that reference to the record may be made more easy.

Copy of proceedings laid on the table, or read.

It is hardly necessary to observe, that the deliberations of the court for the object of final decision, should be characterized by perfect calmness of manner and conversation; and that each member should endeavor to dispossess his mind of any prepossessions or prejudices which may lurk therein, so as to approach the question about to be submitted for his determination, with perfect indifference or impartiality.

Calmness in the deliberation required.

Patience of labor in the investigation, and caution of deliberation in the comparison and weighing of circumstances, are essential qualities

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in the character of a judge,—as important in the search for truth, as integrity of heart for the declaration of it. High and responsible is such a position, and the due appreciation of it, while it evinces a vital honesty in the bosom of the individual, is the only sure guaranty for the becoming administration of justice.

Court may recall witnesses.

It is perfectly competent for the court, at this period of their proceedings, to call back a witness for the purpose of asking any particular question thought necessary; but the parties must be present during such further examination. Indeed, before the finding, the court can recall a witness at any time.

Discussion recommended.

As has been observed above, it is necessary for courts-martial to exhaust the whole charges which come before them, by expressly convicting or acquitting the prisoner upon each allegation made against him; and it often happens that there is a great contrariety of opinion as regards the application of the evidence to the several points, and the degree of culpability of which the prisoner is to be found guilty. Growing out of this cause, although it has been objected to by some, yet it is considered a good practice for the members to indulge in a candid conversation upon the true meaning, or import, of the evidence recorded, and thus enable every member to hear and understand the arguments, in favor of, or against giving it weight in their decision. This course is considered of great propriety, and affords an opportunity of correcting, by the reasoning or observation of the experienced members, any hasty or erroneous opinions which may have been formed by the young-

er part of the court. It certainly should not be considered as dictating to, or improperly influencing one portion of the members by the opinions of the other; nor, when the legal rule, that the younger members shall vote first is considered, should it be supposed that the purpose of the rule is destroyed by such conversation; because, in the development of the views of the individual members, the power of truth and reason must be supposed to operate equally upon all. Indeed, from the nature of the deliberation under consideration, there must be, to some extent, an interchange of opinion, by reference to one another for the ascertainment and correction of specific facts; and the prescription of the law, by which the vote of the junior member is directed to be first taken, can hardly be supposed to have been intended to shut out all the aids of open discussion, and to compel the members to seek their opinions under the veil of mute reflection.

Mr. Tytler, in his essay on military law, expresses himself in one part of his work to the same effect. "Where there are," says he, "distinct and separate charges or articles of accusation, the president and members of the court reason and deliberate separately on each charge; candidly discussing in a free and open conversation, the import of the evidence, and allowing its full weight to every argument or presumption in favor of the prisoner."<sup>1</sup>

Opinions of  
Mr. Tytler.

In another part of the same work,<sup>2</sup> when speaking of the advantages of the mode of trial by court-martial, the writer says, "In the sen-

<sup>1</sup> Page 163.

<sup>2</sup> Page 80.

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tences of courts-martial, no concession of the right of private judgment is necessary. All the members of the court have their unbiassed judicative power; and even the influence of opinion is guarded against as far as possible, by the order in which the opinions and votes of the members are given: the youngest member of the court being required to give his opinion first, and the rest following in progressive seniority up to the president, who votes last."

Inconsistency  
of the opinions.

This latter view is somewhat inconsistent with the previous one quoted, and might tend to confuse and make unsettled the practice of courts-martial on this point. But the opinions of other writers advocate the practice recommended—and Major (now General) Vans Kennedy decidedly approves of it in his remarks on courts-martial. In treating this portion of his subject, he says—"Did, indeed, 'the president and members of the court (as recommended by Tytler) reason and deliberate separately on each charge, candidly discussing in a free and open conversation the import of the evidence, and allowing its full weight to every argument or presumption in favor of the prisoner,' it would contribute greatly both to the unanimity and correctness of the verdict. But courts-martial are averse to such discussions, as they think that they must tend to bias and influence the opinions of the members, and thus render their votes not the conscientious dictates of their own judgments. 'This, however, is refining too much, and so far from there being any impropriety in such discussions, they would on the contrary, ma-

Propriety of  
discussion sup-  
ported by Vans  
Kennedy.

jus-

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Judge advocate  
reads the spe-  
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upon the ground that it puts

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there is a provision of law for the

the "vote or opinion of any parti-

ber of the court-martial," embodied

there seems a necessity, at least a

for certainty, and consequent safety of

members of the court, that the written

Judge advocate  
retains the vote  
of every mem-  
ber and keeps a  
minute of the  
same.

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opinion of the members, as delivered at the time of trial, should be preserved. For what purpose then was that provision introduced, if it were not for the exoneration of the individuals composing the court, who did not vote in accordance with the judgment of the court; or how could such facts be ascertained from the vague and uncertain recollections of men after a considerable lapse of time, influenced, too, as might be the case, by a powerful interest to keep them secret? No—the judge advocate is the proper depository of such secrets, and the written notes, made at the time, the only sure defence against uncertainty and error.

Majority of votes determines the opinion, except in certain cases.

The majority of voices determines the conviction or acquittal of the prisoner, except in such cases, as where (upon conviction) the law absolutely, and without any discretion in the court, condemns him to suffer death. Such, for instance, as is set forth in the fifty-fifth article of war, for forcing a safe-guard in foreign parts. Now as the eighty-seventh article of war expressly limits the power of general courts-martial, to adjudge any person to suffer death, “but by the concurrence of two-thirds of the members,” nor except in the cases mentioned in the articles of war, it follows, that as in the instance referred to, of forcing a safe-guard in foreign parts, and in similar cases, no conviction could be declared without a vote of two-thirds of the members to that effect. In all such cases, and in others where the prisoner is sentenced to suffer death, the record must explicitly state that two-thirds of the court concurred therein.

Two-thirds are required to sentence capitally; and the record must state that two-thirds voted the punishment.

This declaration of the record that two-thirds

of the court voted capital punishment, is important to show, that in the decision of so solemn a question as that of life and death, all the requirements and restrictions of the law were minutely observed.

In cases where a majority, or the entire court condemn a prisoner, it would be a manifest impropriety to state what numbers voted for the decision of the court. To say that the vote was unanimous, would at once reveal the opinion of each particular member, in direct violation of the oath; and to state the particular number of votes would be entirely unnecessary, to say the least of it, and might afford the means of ascertaining the individual opinions. For wise and useful purposes, which are sufficiently manifest, the law has imposed upon the members of the court and the judge advocate, the obligation of secrecy as regards the votes of particular members, and any act of the court itself, or of members of it which, directly or indirectly removes the concealment of opinions so solemnly promised, ought to meet with the severest reprehension or punishment.

So, likewise, would it be equally unbecoming to declare the number of votes by which a prisoner was acquitted. A unanimous verdict to that effect, would be no doubt gratifying to the person tried; but should such be the result of a bare majority, it might in some cases stigmatize him as much nearly as a direct censure. It is therefore necessary, except in the cases of capital convictions, to declare simply the decision, without any reference to the majority by which such decision was made.

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Important that the record should state that two-thirds agreed to the sentence.

Where a majority determines the opinion, the number must not be given; nor must it be said that the court voted unanimously.

The number of votes given for an acquittal must not be stated.



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Equality of votes  
goes in favor of  
the prisoner.

Should it happen, by the organization of the court, or from the accident of sickness or death of any of the members, that there is an equality of votes upon the finding, the doubt must be resolved in favor of the prisoner, and he must have the benefit of an acquittal.<sup>1</sup> The necessity of a total unanimity is confined to civil juries; and it is said, "at least in the *nembda*, or jury of the ancient Goths, there was required, (even in criminal cases,) only the consent of the major part; and in cases of an equality, the defendant was held to be acquitted."<sup>2</sup> A decision of guilt therefore, must, at least, be the act of a majority. Should any other rule than this be adopted, it would, by making an equality of votes indecisive, subject the prisoner to another trial, and the service to vexatious delays, without a greater certainty as to the result.

Finding of the  
court may be  
special.

Trials before courts-martial most often involve the investigation of divers particulars under various and distinct charges. Circumstances which are embodied in the charges, and upon which constructive guilt is charged, are necessarily dependent upon motive, by which the degree of criminality is determined. It consequently rests with the court to ascertain this particular degree, and declare it by their finding; and the verdict may be special, as it is not necessary that it be general, as to the guilt or acquittal of the prisoner. That is, a portion of the specification may be found, and other points declared void of criminality, or the entire circumstances set forth, be proved, and yet the

<sup>1</sup> Simmons on Courts Martial, p. 214.

<sup>2</sup> 3 Black. Com., 376.

prisoner be declared without guilt. But in all such findings, the decision of the court must be clear and specific, so that the amount of punishment, be seen to bear a proper relation to the degree of guilt.

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Decision of the court to be clear and specific.

So it may happen that the entire facts set forth in the specification may be found, and yet the charge itself may not be sustained by the court, and the prisoner be acquitted. In such cases, the guilt of the prisoner has been predicated upon the supposition that there was a criminal knowledge, or intent in the commission of the acts alleged, but of which the evidence has cleared him.

Facts may be found without involving guilt.

The finding, too, besides the special degrees of guilt, may be special as regards the facts; such and such fact or facts declared in the specification, may be proved, and the prisoner found guilty of them, while of others, or other parts of the same specification, the prisoner would be acquitted.

Prisoner may be found guilty of part and acquitted of part.

But it is unnecessary to be more minute upon this part of the court's duty. The simple rule intended to be presented for notice is, that the verdict of the court need not be a general verdict of guilt or acquittal; the prisoner may be found guilty of some portions of the charge, and acquitted upon others. The practice of courts-martial in the service of the United States, has been according to this principle in most cases, and is therefore presumed to be generally well understood.

The degree of guilt of which the prisoner is found, or the extent to which the charge is proved ought to be well defined and clearly ex-

Degree of guilt to be declared.

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Form of declaring an acquittal; improper to say "not proved."

pressed; and so, likewise, the mode of declaring the prisoner acquitted, is a matter of some importance. Various forms have been observed at times, in regard to this latter part, and without intending to cast any censure upon the accused, the court have, by ambiguous terms, employed to express an acquittal, made him obnoxious to malevolent insinuations. To declare that the charges *are not proved*, and therefore the prisoner is acquitted, is certainly an ambiguous and improper way of declaring the innocence of the person tried, as it may, in truth, tend to strengthen the imputations of the charge; and the author therefore is of opinion, that such an acquittal ought not to be recorded.

Terms of an acquittal to correspond with the nature of the charge. "fully," "honorably," "most fully," &c.

Acquittals which are characterized by the terms, *honorably; most honorably; fully; or most fully*, should, of course, be employed only when the nature of the charge makes them necessary. It would certainly, not be an appropriate form, to acquit an officer honorably, of a charge which did not affect his honor. When the charges, therefore, bear upon the honor of the accused, or have been fully disproved, such terms or epithets may be allowable; but in general, where no strong circumstances exist, which call for emphatic opinions, a simple verdict of acquittal is the better formula.

Motives of acquittal, and opinion of the conduct of the accused.

Courts-martial have, at times, stated the motives of acquittal, and given an opinion of the conduct of the accused at length. It is competent for a court-martial to remark upon the conduct of the prosecutor,<sup>1</sup> as connected with the charges, or as developed in the course of the

<sup>1</sup> The accuser.

trial. They have also noticed in terms of disapprobation, matters which appeared as prejudicial to discipline, and to the harmony of the official or personal relations of the officers of particular regiments or corps.

Personal ill will and animosity of an accuser, and frivolous and vexatious accusations, have all been made the subject of observation by courts-martial, and been approved by the revising authority.

This exercise of prerogative on such delicate subjects of controversy as the motives and conduct of the party accusing, irrespective of the mere facts investigated as criminal behaviour, is a just and beneficial means for the preservation of decorum, and tends, no doubt, when discreetly used, to the furtherance of good order and subordination. So also have courts-martial, under particular conditions of strong asseverations on the part of the accused, when not supported by proofs, thought it becoming to declare their opinion that the prosecutor had been actuated by proper motives, by a sense of duty and regard for the service, and that his conduct had been laudable and honorable. Such declarations on the part of the court, have generally accompanied acquittals, though at other times a conviction.

The conduct of witnesses, more especially when belonging to the military service, has also been animadverted upon by courts-martial; and they have been justified in so doing. Falsehood or prevarication, when perpetrated by a witness, speaking under the solemn obligations of an oath, is certainly a most immoral, as well as

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Competent for the court to remark on conduct of the prosecutor, or upon matters affecting discipline or the harmony of particular regiments or corps.

Animosity of accuser; frivolous and vexatious charges remarked upon.

Declaration by the court in favor of the prosecutor.

Conduct of witnesses animadverted upon.

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VIII.

Courts-martial  
to be guarded  
how they cen-  
sure witnesses  
in civil capa-  
city.

dangerous act, and, therefore, all communities which have enjoyed the benefits of a judicial system, have considered and punished it as a high offence. In noticing misconduct on the part of military witnesses, it is proper that the observations of the court should be specific, not general,—so that the offending person may be brought to answer, by the proper authority, for such misconduct. Courts-martial, however, should be very guarded how they censure witnesses in a civil capacity, for inconsistencies or prevarications, as such might lead to prosecutions for defamation; though, in some cases, affecting persons in civil life, an allusion to facts may be very just and necessary. How far a court-martial may think itself authorized to animadvert upon the conduct of individuals not before the court, must, of course, depend upon the particular circumstances of each case; but this is, undoubtedly, a very nice task, and ought to be resorted to only in extreme cases: as to censure or condemn a person without a hearing, unless he purposely keep out of the way to withhold evidence which he might afford, would clearly infringe a prominent rule of justice.

General rule.

As a general rule, it may be said, that courts-martial possess the right, as it is their duty, to notice all such matters, connected with the particular case submitted for examination, as have a bearing upon the harmony and respectability of the service.

May find a pris-  
oner guilty in  
a less degree  
than charged.

In the deliberation of the court upon the finding to be declared, it is necessary also to observe the distinctions which may be made between the crime as alleged in the charge, and the de-

gree of offence proved. A court-martial, therefore, may, in some instances, find a prisoner guilty of the offence in a less degree than that stated. For example, a prisoner charged with desertion, may be acquitted of the charge, and found guilty of absence without leave. Here it is manifest that the offence proved is of the same character as the one charged, but differing in degree, arising from the intention of the accused party. So, in all such or similar findings of a court-martial, must there exist a kindred nature between the offences, as it would clearly be a violation of justice to find a prisoner guilty of a crime differing in kind, and therefore not depending upon degree of culpability, from that with which he stands charged.

It is evident too, that as a prisoner stands charged with a specific offence, and necessarily defends himself from the accusation as laid, a court-martial, although empowered to find him guilty in a less degree, cannot find a higher degree of guilt than that alleged in the charge. The various degrees of culpability must be taken into consideration for every act which may be divided into offences of greater or less magnitude; and members of courts-martial, when deliberating upon the question of guilt or innocence, should be careful not to confound what is merely an extenuation, or palliative, with the evidence of commission of the crime specified. A soldier, who should, under the excitement of great provocation, strike an officer, would doubtless be guilty of mutiny, notwithstanding the cause, of improper treatment, which he had suffered: and a sentinel, after the fatigue of a day's

Prisoner can  
not be found  
guilty in a  
higher degree  
than charged.

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VIII.

march, who should sleep on his post, would necessarily incur the penalty of the law for such act. These causes, then, which led to the offences indicated, might, according to circumstances, be admitted in extenuation of the crimes committed, but could not, most assuredly, authorize an acquittal.

The manner of  
voting.

If a decision is  
not made the  
first time, the  
court votes un-  
til a finding is  
declared.

The evidence having been fully considered, the opinions of the members are received by the judge advocate, and submitted to the court. Although an open and free discussion has taken place prior to the finding, still, it does not always necessarily lead to the exposure of each individual opinion; and, therefore, it is not required of each member to pronounce or declare his openly. To avoid the knowledge of this as it is given, the members write upon a slip of paper the opinion, *guilty*, or *not guilty*, or with such exceptions and modifications as may be thought just, and hand them to the judge advocate, who, after receiving every vote, arranges them and announces the verdict. Should there not be a majority, or number sufficient to determine it, the fact is stated, and the court will discuss the subject further, and vote again, until a finding is declared. This mode of voting is followed upon every specification, and charge. By this form of voting, it is seen, that the opinion of any one member is not known to the court, until after all have voted, and it is only upon arranging the votes, for the confirmation of the verdict, as announced by the judge advocate, that the opinion of each member is read.

The finding thus declared by a majority, or specific proportion of all the court, where the law, in particular offences, requires such, is the decision of the court, and the minority are bound by it.

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VIII.

The finding by the majority, or two-thirds, is the decision, and the minority is bound by it.



## CHAPTER IX.

### OF THE SENTENCE.

CHAPTER  
IX.  
Acquittal, or  
the sentence.

THE court, having determined the finding of innocence or guilt of the prisoner, proceed to the conclusion of their labors by pronouncing an acquittal, or affixing the punishment, according to the nature and degree of the offence.

No evidence of  
character re-  
ceived after the  
finding.

As there is no authority, vested by law, in a court-martial, to receive evidence of the character of the prisoner, or of former convictions after the finding is made, in order to measure the quantum of punishment, or kind to be inflicted, it necessarily follows that the remaining step for the court to take, is to declare the punishment which the convict shall suffer.

The minority  
bound by the  
decision of the  
court.

Courts-martial, as has been observed in a preceding page, declare their opinions by a majority of votes; it has, therefore, been made a question by some, of how far the minority is obliged to consider the finding of a majority, when the sentence is to be determined.

Courts-martial  
act in a two-  
fold capacity.

It must be recollected, that a court-martial acts in the twofold capacity of judge and jury; and this being admitted, the difficulty which has presented itself to some minds upon this point, is at once solved.

Whatever is done by the court, either a judicative or ministerial act, must be done by the whole court, and it therefore would be mani-

festly illegal for a court-martial to pronounce any judgment, which had not been considered and acted upon by all the members. Whatever may have been the opinion of a member as to the finding of the court, he must, upon a conviction being declared by the legal number of votes, give his opinion as to the nature and degree of punishment, and apportion the same according to the degree of crime of which the majority has found the prisoner guilty. The minority thus acts independently of their individual opinions, and award punishment according and adequate to the offence of the accused.

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IX.

Every member  
must vote a  
punishment.

A member who has voted for an acquittal, would necessarily, when called upon to vote for the sentence, be inclined to regard the guilt of the prisoner, as determined by a majority of the court, in the most favorable light, and give as light a sentence as his judgment and conscience would permit in such a case; so that his vote might, to some extent, meliorate the condition of the prisoner.<sup>1</sup>

In cases not within the discretion of the court to affix the punishment, it inevitably follows that the punishment is in accordance with the law, and the finding of the court, and cannot be modified by any individual opinion of a member, as to the guilt or innocence of the prisoner.

The oath which every member takes, requires and obliges him to "administer justice according to the articles of war," and of course, it follows, that upon the conviction of a prisoner for

<sup>1</sup> This principle was remarkably exemplified by the votes of the dissenting members in the late trial of Bishop B. T. Onderdonk of New York. (See the Trial.)

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a particular offence, every member must vote the punishment which the law has prescribed. Such cases do not admit of an appeal to the conscience for the solution of any doubts which may exist, for where the law has prescribed a rule, no doubt can be entertained.

In all decisions of the court, the will of the majority binds the minority, and should the members who have voted for an acquittal, be excused from voting for punishment, it is evident that the opinion of the majority would lose its usual effect and power. The moment that the finding is recorded, the right of individual judgment ceases, and the opinion thus declared is alone the legal opinion of the court.

A little reflection will show, that if all the members were not obliged to vote a punishment in accordance with the finding of the court, it might sometimes happen, that an officer might be cashiered, or a soldier condemned to corporal punishment, by the vote of a minority of the court. This would be a manifest absurdity, and opposed to the governing principle of adjudicating questions by courts-martial. And should the minority of the court always cast their votes for the most lenient sentence, it would operate to the advantage and benefit of the criminal, in opposition to the requirements of justice, and cause the punishments awarded to be very disproportioned to the degree of offence, of which the prisoner is culpable.

It is affirmed by those who advocate a different rule, that it is incongruous for members to vote a punishment, who have declared by their finding, that the prisoner is innocent of the

charges alleged against him. But would it not be equally reasonable for members to say, that they are not bound by any interlocutory decision of the court, as to the reception or rejection of evidence, because they did not agree with such decision? If such a principle could be admitted, it is very certain that no proceedings of a military court could ever be perfected, inasmuch as unity of opinion is not to be expected throughout the entire proceedings.

The practice of the American service has generally been in accordance with this rule, though the author has known instances in which an acquitting member urged the propriety of his being excused from voting a punishment, on the ground that he had already declared the prisoner innocent. The principle of legality involved in this rule, by which a certain number of officers are named to constitute a court-martial, renders the observance of it obligatory upon every court, and therefore it is now laid down as a positive and certain law for the guidance of military courts.

"If a member should vote for death, which is not carried by two-thirds of the court, he must vote some other punishment. All members must vote some legal sentence, and if that which any member votes for is not carried, some punishment must be voted till a majority agree as to one punishment."<sup>1</sup>

Member voting for death, which is not carried, must vote some other punishment.

This rule is essential. It sometimes happens that in the multiplicity of sentences proposed, there is not a majority of voices in favor of any one of them; it therefore is a necessity that

<sup>1</sup> Hough's Mil. Law Authorities, p. 113.

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opinions should be so far modified as to admit of a decision being made. Courts-martial, unless in cases, where from some particular causes, they think it not just to impose any sentence, are bound to affix a punishment to the offence of which the prisoner has been found guilty; and of course, where a diversity of opinion at first exists there must be some compromise in order to determine a sentence.

The same difficulty is also sometimes experienced in regard to the finding. Courts-martial are bound to determine the matter before them according to evidence, and this determination can only be effected by a conscientious consideration of the testimony in its bearing upon the various parts of the charge, and a liberal exercise of temper and reason in its application. The question of guilt or innocence, and the modifications of the degree of it, is, however, more easily determined, than the kind or question of punishment, and therefore is comparatively an infrequent cause of embarrassment.

Every member  
must vote upon  
every question.

Every member must vote upon every question presented for settlement by the court. The interlocutory judgments of the court, which may affect the course or progress, and even the termination of the trial, can only be made by the action of all the court. And so more emphatically in the questions of guilt or innocence and punishment, must every member give his opinion.

Opinions re-  
specting mem-  
bers voting a  
punishment,  
not now appli-  
cable.

In the works of several military writers there is a wide difference of opinion upon the question, of acquitting members voting a sentence of punishment; but those writers, expressed opinions

of many years ago, and which are now considered inappropriate in a legal point of view. The modern practice is opposed to them, and the rule is understood to be established as set forth in this treatise.

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Civil juries are required to find a verdict before separating, but such is not the case with military courts. Possessing a judicial power, the latter exercise a double function, and are therefore not bound by the same restrictions which are imposed upon jurors in common law cases. Indeed, the nature of the offences considered by them, pertaining to, and affecting a particular community only, makes it unnecessary. They therefore may adjourn from day to day, to consider their finding or sentence. This power in a court-martial to take time for deliberation, when they come to make a final decision is of great importance in military trials; relieving the mind from the weariness of thought when oppressed with doubt, and enabling the members to consult authorities and inform themselves upon questions, involving legal proprieties, with which their profession or pursuits might not have required much acquaintance at a previous moment.

Courts-martial may adjourn when considering their verdict.

In deliberating upon a sentence, it is of importance to the court to consider what kinds and degrees of punishment are legally applicable to the case. In a general sense, it is understood that no punishments can be inflicted except such as are prescribed by statute, or are in accordance with the custom of war. Where a statute has designated a penalty for a particular offence, none other than that particular penalty can be

Kind and degree of punishment applicable to the case.

Rule respecting punishment.

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Courts-martial  
to be guarded  
how they cen-  
sure witnesses  
in civil capa-  
city.

dangerous act, and, therefore, all communities which have enjoyed the benefits of a judicial system, have considered and punished it as a high offence. In noticing misconduct on the part of military witnesses, it is proper that the observations of the court should be specific, not general,—so that the offending person may be brought to answer, by the proper authority, for such misconduct. Courts-martial, however, should be very guarded how they censure witnesses in a civil capacity, for inconsistencies or prevarications, as such might lead to prosecutions for defamation; though, in some cases, affecting persons in civil life, an allusion to facts may be very just and necessary. How far a court-martial may think itself authorized to animadvert upon the conduct of individuals not before the court, must, of course, depend upon the particular circumstances of each case; but this is, undoubtedly, a very nice task, and ought to be resorted to only in extreme cases: as to censure or condemn a person without a hearing, unless he purposely keep out of the way to withhold evidence which he might afford, would clearly infringe a prominent rule of justice.

General rule.

As a general rule, it may be said, that courts-martial possess the right, as it is their duty, to notice all such matters, connected with the particular case submitted for examination, as have a bearing upon the harmony and respectability of the service.

May find a pris-  
oner guilty in  
a less degree  
than charged.

In the deliberation of the court upon the finding to be declared, it is necessary also to observe the distinctions which may be made between the crime as alleged in the charge, and the de-

gree of offence proved. A court-martial, therefore, may, in some instances, find a prisoner guilty of the offence in a less degree than that stated. For example, a prisoner charged with desertion, may be acquitted of the charge, and found guilty of absence without leave. Here it is manifest that the offence proved is of the same character as the one charged, but differing in degree, arising from the intention of the accused party. So, in all such or similar findings of a court-martial, must there exist a kindred nature between the offences, as it would clearly be a violation of justice to find a prisoner guilty of a crime differing in kind, and therefore not depending upon degree of culpability, from that with which he stands charged.

It is evident too, that as a prisoner stands charged with a specific offence, and necessarily defends himself from the accusation as laid, a court-martial, although empowered to find him guilty in a less degree, cannot find a higher degree of guilt than that alleged in the charge. The various degrees of culpability must be taken into consideration for every act which may be divided into offences of greater or less magnitude; and members of courts-martial, when deliberating upon the question of guilt or innocence, should be careful not to confound what is merely an extenuation, or palliative, with the evidence of commission of the crime specified. A soldier, who should, under the excitement of great provocation, strike an officer, would doubtless be guilty of mutiny, notwithstanding the cause, of improper treatment, which he had suffered: and a sentinel, after the fatigue of a day's

Prisoner can  
not be found  
guilty in a  
higher degree  
than charged.



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a court-martial, be not provided for by a special penalty, but left to be determined by the discretion of the court, such sentence must be in accordance with the common law of the land, or the custom of war in like cases: a departure from this would make the sentence unusual, and as such, unlawful.

In stating sentences, clear and unambiguous terms to be used.

In passing sentence, courts-martial should be careful to employ clear and unambiguous language, so that the kind and degree of punishment shall be set forth definitely and precisely; and the mode of inflicting capital punishment should be designated. The military laws do not say how a criminal, offending against such laws, shall be put to death, but leave it entirely to the custom of war. Shooting, or hanging, is the method determined by such custom. A spy is generally hanged; and mutiny, accompanied with loss of life, is punished by the same means. Desertion, disobedience of orders, or other military crime, usually by shooting: the mode, however, in all cases, (that is, either *shooting* or *hanging*,) may be declared in the sentence. The sentence, too, in capital cases, may simply declare the judgment—*to be shot to death with musketry*,—*or be hanged by the neck until dead*; or it may add, *at such time and place as the commanding general*, or (as the case may be) *the President of the United States may appoint*.

The mode of execution may be stated in the sentence.

Corporal punishment.

So, for instance, should the language of the sentence be full and explicit when corporal punishment is to be inflicted, or when the convict is to be marked: as that, *he receive — lashes on the bare back, with a cat-o'-nine-tails*, or *that he*

*be marked on the — hip with the letter D, one inch in length, in indelible ink.*

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As soldiers are marked for desertion with the letter D, and also, at times, with the same letter for drunkenness, it is recommended, that for the first named offence the mark be put on the *left* hip, and for the other on the right hip. This will enable any officer, afterward, should the convict be presented for notice, to determine the offence for which he has been marked.

Marking for desertion or drunkenness.

As the judgment of a court-martial is not final, but must be reviewed and approved before execution, it is not competent for a court-martial, in sentencing an officer to be cashiered, to add, *and he is hereby cashiered accordingly*. Such language would exceed the power and authority vested in a court-martial, and, therefore, is entirely misplaced and inoperative.

Judgment pronounced not final until approved. Improper to put in the sentence that an officer "is hereby cashiered accordingly."

In order to guard against any misapprehension of the meaning of the court, it is not only necessary to be cautious in the use of language which expresses the sentence, but in every case where the law has made special provision for the punishment of particular offences, and, indeed, in every case in which it can be done, the court would do well to use the precise terms employed by the statute; by this means all doubt and cavilling are obviated.

Words of the statute to be used.

The period of imprisonment is sometimes expressed by the sentence to commence from a certain date. In cases where no day is declared, it is understood to begin from the promulgation of the sentence; and should an unusual time elapse between the approval and the promulgation of the sentence, such, beyond the time ne-

Imprisonment, when commencing.

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cessary for its communication, is counted as part of the punishment. This, for ordinary or simple imprisonment, is just, inasmuch as the convict is confined, necessarily awaiting the publication of the sentence; where solitary confinement, or confinement on low diet, is denounced against him, the time so named must, of course, be completed with the conditions required.

Recommendation in favor of prisoner.

The sentence of the court, as has been remarked, is not final; and in cases where the law has declared the punishment to be inflicted, there may be extenuating circumstances, to induce a favorable recommendation of the prisoner.

Court may allude to its motives of judgment.

Where the law has left it discretionary with the court to determine the sentence, the motives by which the court have been actuated in determining the same may be alluded to, and such allusion ought to be in brief and precise terms.

Method of recommending prisoner, formerly.

The manner in which a recommendation to mercy was presented for consideration formerly, was extremely variant; at times being embodied in the sentence, and at others appended to it. It was also frequently expressed as to the manner in which this merciful recommendation was to be carried out. This changeable and uncertain mode was, of course, objectionable and improper. The manner in which recommendations are to be made, is now prescribed by the regulations for the army. Paragraph 231 says, "No recommendation will be embraced in the body of the sentence, but will be inserted after the signatures of the president of the court and the judge advocate. Such members only, who recommend, will sign the same." The writer will add, that a court-mar-

Recommendation, mode of, prescribed.  
The particular action to be observed not to be pointed out.

tial ought not to point out any particular mode in which the clemency of the commanding general, or the president of the United States should be exercised.

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The recommendation is written, as directed, immediately below the sentence, and this is observed as a better way than that of writing it upon a detached piece of paper, or making it the subject of a letter,—as such papers are liable to be mislaid or lost.

Recommendation written below the sentence.

By the regulation above quoted it is seen that a majority of the court is not required to concur in a recommendation, and thence it would seem that a recommendation is *not an act of the court*, but the mere expression of the wishes or opinions of the individual members who sign it. There is something contradictory or incongruous in this, and apparently opposed to all other acts, so far as the court is considered as a body, which are borne upon the record. It is, indeed, a matter worthy of consideration, whether any recommendation should be allowed to appear which is not concurred in by a majority of the court. Would not, indeed, the recommendation of a minority only, be conclusive evidence against the prisoner of the court's opinion? and can it be expected that such recommendation should meet with a favorable reception at head quarters!

Recommendation the act of individual members.

The regulation, it is true, admits the recommendation of a minority, even of an individual, to be appended to the record, and, therefore, it must be expected that such recommendations will, at times, appear; but, it certainly ought to be weighed in the minds of those persons favorably disposed to clemency, whether, under such

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**Recommendation when the punishment is discretionary.**

circumstances, the appeal for mercy may not be, with the reviewing authority, a substantial reason for the confirmation and execution of the sentence.

When the judgment of the court, as to the amount and kind of punishment, is discretionary, it appears somewhat in contradiction to the sentence to offer a recommendation in favor of the prisoner, unless such recommendation comes from a minority of the court; and this is objectionable to a degree, because it may, in fact, indicate the opinions of the particular members. Why should a court,—that is, the majority, offer a recommendation to mercy and throw the embarrassment and responsibility of acting on such, upon the reviewing officer, when they themselves have the power to declare a mitigated punishment? Now, it is true, there may be cases in which the court feel bound to pass a sentence of punishment of some kind, however light or insignificant, though, at the same time, believing the prisoner to be excusable, and, therefore, recommend a total remission of it; still, the objection exists in part, and particularly so against the presentation of a recommendation when not sanctioned by a majority of the court. The custom of the service admits a recommendation from a minority of the court; but it is respectfully submitted to all members of courts-martial whether the utmost caution should not be observed in following such practice; a practice which, however based upon the exercise of humane feelings, often exhibits the opinions and acts of the members, as unstable and inconsistent!

It is an acknowledged right, as being within the competency of the court, to modify or change the sentence passed by them, at any time previous to their final adjournment.

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Court may  
change the sen-  
tence.

In the case of Peter Williamson, who was tried in June, 1819, for desertion, the court sentenced him "to confinement at hard labor with a ball and chain attached to his leg," &c., &c. Upon the ensuing day, at the suggestion of a member, the said sentence was reconsidered, and the court substituted the following:—"That the said Peter Williamson be shot to death."

Case of Peter  
Williamson.

Upon reference of this question, as to the power of the court, the attorney general thus maintained the right claimed by the court-martial:<sup>1</sup>

"In courts of civil jurisdiction, when sitting even in criminal cases, the court is not concluded by an opinion which they may have expressed in any one day of its session, the whole subject being completely within its control until the end of the term. On recurring to the authors who have treated of military law, I perceive no difference between martial and civil courts in this respect:—the term of the martial court continues from the time of its assemblage until its adjournment *sine die*; the term of the civil courts of the nation continues from the time of their assemblage until their adjournment to the court in course. And I am not apprized of any difference in the powers of the two courts, over the subjects which severally belong to them, during the continuance of their respective terms."

<sup>1</sup> Opinions, p. 215. Wirt.

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"A general court-martial convened for general purposes, continues a court, with full powers, while it has any business to do, of which it alone is the judge; and while it does so continue a court, its power of judicial deliberation and decision over all the subjects which may have been brought before it, is as full on the last day of its sittings as on any previous day."

## CHAPTER X.

### CONFIRMATION OF PROCEEDINGS. REVISION.

By the sixty-fifth article of war it is ordained, that, "no sentence of a court-martial shall be carried into execution, until the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being;" or according to the circumstances of the case, "shall have been transmitted to the secretary of war, to be laid before the President of the United States, for his confirmation, or disapproval and orders."

There is no distinct authority given to any officer to remit the proceedings of a court-martial for re-consideration; but this power seems to be incidental to the constitution of courts of justice, and by which the judge may remand a jury for the re-consideration of their verdict. By analogy, the same authority is vested in the reviewing officer of a court-martial, and is an authority whose exercise is founded in expediency and policy, and tending to the most beneficial ends.

The advantages to be secured by this confirmation of a sentence before it can be carried into execution, are too obvious to need any explanation, and attain for the prisoner all the benefits of a disinterested and experienced judge. When the proceedings of a court-martial are

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Confirmation  
of sentence.

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Advantage or benefits of confirmation prior to execution of sentence.



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submitted to the officer ordering the same, for his confirmation or disapproval and orders, it becomes his duty to peruse, in the most careful manner, the record of the court, and to ascertain any error which may have been admitted. Or should the record be found perfect in all its parts, he is to signify his decision thereon, and give his orders accordingly. But if any mistake or error in the conduct of the trial be presented to view, the proceedings of the court may be sent back to them for revision.

Additional evidence not admissible upon review by the court.

To *revise* the proceedings, is, as the term itself imports, to re-examine, or to look over again, what has been done, and therefore would signify that nothing else is meant, than a mere *re-consideration* of the opinions, finding, and sentence, which have been already pronounced; and accordingly the fundamental rule to be observed is, that upon a *revision*, *no additional evidence can be taken*, but that the recorded testimony, as it stands, must be the sole basis for the judgment of the court. Were not this rule strictly observed, it would be tantamount to opening the trial *de novo*, and after the prisoner had disclosed his defence. To permit the re-examination of a witness previously called, for explanation even, would induce the necessity of permitting a cross-examination by a party, which might involve new matter, and thus run into a prolonged investigation. The characters of witnesses might be impeached and re-established, and new circumstances to which they might depose, be disproved by contrary evidence. The illegality of such procedure is certain, and cannot be allowed.

The principle, then, which directs the conduct of a court-martial, being thus simple, it is a matter of importance to understand under what circumstances a revision ought to be ordered, and how far a court may amend any portion of its proceedings. The officer who directs a court-martial to re-convene, to re-consider its original opinion, points out, at the same time, the particular cause which makes a re-consideration necessary; and the court is therefore bound to re-examine with deliberation and care, the reasons upon which the former opinion rested. The principal cause for requiring courts-martial to revise their judgments, is where an insufficient or undue weight has been given to the testimony, and is supposed to arise from inadvertence, misconception of the law, or the custom of war; or where an exorbitant, inadequate, or illegal punishment has been awarded.

But it must be remembered, that a court-martial on revision, cannot alter or obliterate any of its proceedings, or expunge any recorded testimony. Nor after the record of a judicial proceeding has been made up, can it be in any manner altered, though additions may be made to it. It thence follows, that the original finding, or sentence, cannot be effaced, but that the revised opinion is merely an addition to the original record. Where irrelevant evidence has been admitted, or an incompetent witness has been examined, it is not held sufficient to vitiate the proceedings; and the reviewing officer, on a consideration of all the circumstances, may either confirm the sentence or extend his pardon to the prisoner. "If the finding of the court,

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When a revision of proceedings to be ordered.

Principal causes for revision of proceedings.

Proceedings—alteration or obliteration of, forbidden.

Irrelevant evidence, or incompetent witness does not invalidate proceedings.

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in such case, be agreeable to equity and justice, there are not sufficient grounds for a pardon. It is only when the finding of a court-martial is founded on irrelevant matter, or is not supported by, or contrary to the evidence recorded, that a pardon may reasonably be expected,"<sup>1</sup> or a new trial granted.<sup>2</sup>

Case of Captain  
Hall.

In the case of Captain Nathaniel N. Hall, who was tried by a general court-martial at Plattsburgh, N. Y., on the 5th of June, 1818, there was an appeal made by the prisoner to the President, on the ground that the court had refused to receive certain evidence, which was both legal and material to the defence. Upon the question which then arose, as to the power to grant a new trial, the attorney general, (Mr. Wirt,) said:<sup>3</sup> "the President of the United States had the power to order a new trial for the benefit of the prisoner; and such power was derived from the language of the 65th article of war, of the act of Congress of April 10th, 1806, which says—that in certain cases, the proceedings are to be laid before him, for his confirmation or disapproval, and *orders in the case*; the last words, having no other just interpretation than the acknowledgment of such authority. In revising a sentence, and ordering a new trial, he is, however, to be governed by the same considerations which would determine a superior court of law, in an appeal from the inferior civil courts."

But although a court-martial, on revision, is competent to amend any defect which has re-

<sup>1</sup> Kennedy, p. 233.

<sup>2</sup> 3 Black. Com., p. 387. Note.

<sup>3</sup> Opinions, p. 171.

sulted from its own decision, not connected with questions of legality of procedure, it yet nevertheless, cannot amend any illegality as to the constitution of the court, or any defect in its composition; nor can any illegality in the charge be so remedied. Such deficiencies must be fatal to all the proceedings, and any sentence or opinions rendered by them be entirely innoxious to the prisoner. Errors of this description must entirely invalidate the action of the court, and render the prisoner liable to trial by another court. In the treatise on the practice of courts-martial by Captain Simmons, (page 325,) a contrary opinion is entertained. "But (says he) it cannot be admitted that every such capital error must, *necessarily*, so entirely annihilate the court, as to expose the prisoner to trial by another court-martial." And, "a court of inferior jurisdiction may still, in itself, be a legal court, though not legally competent to entertain a particular charge, or any charge against an individual of privileged rank, for the trial of whom a court specially composed is enjoined, as in the case of a field officer; but a trial, having, by inadvertence, illegally taken place before such intrinsically legal court, and an acquittal or conviction being once recorded, the statute just quoted,<sup>1</sup> must preclude any further trial. If, indeed, the court be of itself illegally constituted, as for instance by assembling under an expired warrant, by administering an improper oath, or by omitting the appointed one, it is, in fact, no court at

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Court-martial upon revision competent to amend defects of its own decision.

Opinion of Captain Simmons.

<sup>1</sup> That no officer or soldier being *acquitted or convicted of any offence* shall be liable to be tried a second time by the *same or any other* court-martial for the same offence. (British Statute.)

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all, and therefore, whatever opinion such illegal assembly may be pleased to express in writing, it cannot be termed the acquittal or conviction of an officer or soldier by a court-martial; their acts would be mere nullities."

Distinction remarked upon.

The distinction which is here attempted to be drawn, appears to the author to be without legal existence. It is true that there is a difference in fact between the acts of a legally constituted body, and of an assembly not recognized in law; but the first being illegal has no more efficacy in binding the subject to whom they are applied than those of the latter, which are admitted to be without force. A judicial body which is forbidden by law to entertain jurisdiction of certain offences and of particular persons, cannot most assuredly by neglect and non-observance of the injunction, restrain another tribunal in the exercise of its legal powers. Such a principle if admitted would lead to the grossest abuses, and weaken the securities against crime, and the foundations of criminal justice. The language of the fundamental law both for this country and for England, is, that "no person shall be subject for the same offence to be twice put in jeopardy of life or limb." And how can a person be put in jeopardy (legal jeopardy) by the action of a court which has no power to enforce its mandate?

Acquittal or conviction must be legal in order to bar another trial.

An acquittal or conviction in law, signifies a *legal* acquittal or conviction; and the judgment of a court having no power to try, cannot declare such acquittal or conviction. If a court is limited in its judicial powers, all acts by it which transcend such limits, cannot be acknowl-

edged, for if it were otherwise, of what use in imposing any restraint upon its authority?

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Now a court of this description, though legally constituted, which should take cognizance of acts and persons, refused to it by law, is in reference to the particular subject before it, no court at all. And a body which is only clothed with authority for the attainment of particular objects, cannot be considered as covered with the judicial vesture when it departs from the purposes for which it was erected.

A court of inferior jurisdiction is in itself undoubtedly a legal court; but its acts can only have effect within the sphere of its legitimate jurisdiction. Now to effect a legal acquittal or a legal conviction, which may forever thereafter operate as a bar to a trial for the same offence by another court, the powers of the court which tries must be competent to entertain or take cognizance of the crime charged, and of the person offending. It is not sufficient that the court, which thus notices a charge, or a criminal beyond the pale of its jurisdiction, should in itself be a legal court, to place the prisoner beyond the possibility of another trial; but it must have full authority for its proceeding, to ensure such a consequence. To the writer the principle seems not at all affected, whether the courts in question be of one description or another, and the opinion given by the author referred to, would be equally applicable to trials by an ecclesiastical court, (which is undoubtedly a legal tribunal for certain purposes,) as to trials by an inferior court-martial.

In a note to page 326, Captain Simmons, in

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noticing a difference of opinion by Major Vans Kennedy upon this point, reiterates his own, and refers to a case, and the opinion of Sir J. Beckett, judge advocate general, (December, 1828,) in illustration and support.

The case, so far as it may be understood by the reference in the note, does not sustain his opinion; for it does not appear that the trial was an *illegal* one, though there were such objectionable matter with reference to its organization or composition, as to induce a recommendation for the remission of the sentence, and restoration of the prisoner to duty. It necessarily followed, therefore, that the prisoner could not be brought to trial a second time for the same offence.

Rule.

The greatest latitude, it is believed, which can be claimed in favor of a prisoner on this head, is that where a court of adequate powers has proceeded to judgment, no second trial can have place—for though the decision may be illegal, and therefore not binding, still it was the act of a legitimate court, exercising legal authority, but erroneous in result. The prisoner has by the proceedings been in a legal sense jeopardized in his interests or safety, and he is not responsible for the errors of the court, nor while its powers were exercised was his amenability to punishment destroyed or diminished.

New trial as an  
act of mercy.

Where a prisoner has been found guilty, contrary to evidence or upon irrelevant or improper testimony, a new trial, as an act of mercy, may be granted, "But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first."<sup>1</sup>

<sup>1</sup> 4 Black. Com., 361.

The requirements of the law, as regards the action of the reviewing officer, are very distinctly set forth, and accordingly no sentence can be carried into execution until after the whole of the proceedings shall have been confirmed. This confirmation of the sentence, by the officer vested with the authority so to do, is usually affixed with his signature to the proceedings—and the decision is announced in orders. Should the reviewing officer disapprove the proceedings of the court, he may direct the same for revisal, or according to the circumstances of the case, remit the sentence and order the prisoner to duty. There are times in which it is better to release the prisoner than to re-assemble the court for a reconsideration of his case, and this without prejudice to the service. Doubts on the part of the court, which if very nicely scrutinized may not appear strictly legal, sometimes lead to opinions which the reviewing officer cannot affirm; and yet they are supported by such appearances of propriety, as to make very uncertain the action of the court if the proceedings be sent back for revisal. Under such conditions, if the crime charged against the prisoner be not of a character, taking into view the particular time and occasion of its commission, to jeopardize the principle of subordination and military security, it would be preferable to dissolve the court, with such observations upon the proceedings as the peculiar case might justify.

There has been made by some reviewing officers a distinction between the *approval* and *confirmation* of the proceedings of courts-martial. All such distinctions can only be made

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properly by the law itself. Whenever there is a doubt as to the proper terms to be employed to express the decision of the reviewing officer, reference should be made to the statute, and such language or terms be selected as are embodied therein—no other rule is safe. According to the language of the 65th article of war, to *confirm* the proceedings, covers by this term of approval all the doings of the court including the sentence—and to *disapprove* the same, equally rejects all.

If there be errors in the proceedings which are not so grave as to conflict with the rights of the prisoner, or the demands of justice—such errors would be adverted to and modify the decision of the reviewing officer, but not necessarily lead to an absolute disapproval of all that the court had done. And so if the sentence should be too inadequate, or on the contrary, too severe for the offence of which the prisoner is found guilty, the like discretion is left to the reviewing authority to animadvert upon the same, and according to his opinions as to the wants of the service, either send back for revisal, mitigate, remit, or confirm the sentence.

Distinctive  
terms unnecessary  
to be used.

The writer would by these remarks endeavor to present the fact, that the use of distinctive terms as applied to the process of investigation, and to the final opinion of the court, is neither required or necessary, but that whenever either the first or the second part of the trial is defective, the reviewing authority may, in remarking upon the same, either confirm or disapprove, according to the proprieties of the case, the whole proceedings.

When courts-martial have, upon revision, adhered to the judgment first pronounced, the form above adverted to has been most frequently used. The reviewing officer in such cases may, in order that the criminal shall not go without punishment, prefer to confirm the proceedings, should no legal barrier intervene; and where the first sentence has been exorbitant, can remit such portion as he may deem excessive.

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Sentence may be partially remitted.

Provocation received should be considered by the reviewing authority, in determining on the propriety of mitigating a sentence.<sup>1</sup>

Provocation received to be considered.

The duty of every officer having authority to review the proceedings of courts-martial, is limited; and he has power only to suspend the execution of the sentence, "pardon or mitigate any punishment ordered by such court."<sup>2</sup> He cannot alter, or commute the punishment, even with the consent of the party sentenced.

The power and duty of reviewing officer limited.

The law has clearly given the power to the officer who orders a court-martial, except in cases of capital punishment, or the cashiering or dismissing a commissioned officer, to pardon, or to mitigate any punishment ordered by such court-martial. To pardon is to absolve from punishment: to mitigate the punishment is to make it less in degree, but of the same species. Beyond this the reviewing officer cannot go. Any attempt to change the punishment in kind would be illegal, and such an exercise of authority would be the assumption of exclusive judicial, as well as to a certain degree, of legislative power. To commute punishment, is to substitute for the one ordered, another of a different

Pardon or remission of punishment.

Mitigation of punishment.

Commutation of punishment.

<sup>1</sup> *Opinions*, p. 732.

<sup>2</sup> 89th Article of War.

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the above ; pro-  
priety of show-  
ing the reasons  
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kind,—to change the species by the mere will of the individual, without any reference to judicial sanction.

These propositions are plain and simple ; but it is proper to remark, that there has been, and still is, a diversity of opinion in relation to their legal propriety. The opposing views have been sustained by able and distinguished legal gentlemen, occupying high places of trust and honor under the government, and as such views, involving the principles here stated, at the same time seem to contradict their simplicity, or at least put in doubt the essential fact of what is a *mitigation* of punishment, or in what the *commutation* of a sentence consists, it is due to the high and influential source from whence they emanate, that the reasons, which have induced a difference of opinion on the part of the writer, should be more fully developed.

Reference to  
decisions in the  
army and navy.  
Question of le-  
gality raised  
thereon.

The decisions to which reference is made, are in those cases in which officers have been adjudged to be cashiered or dismissed the service, but which sentences have been changed by order of the president, to suspension from rank and command, with or without pay, for a specified time. The question has accordingly been raised, and presented to the minds of many members of the military service,—Was such decision or order of the president legal ?<sup>1</sup>

Distinct species  
of punishment  
which admit of  
no degrees.

There are two distinct species of punishment authorized by the military laws, which admit of no degrees of severity. They are, 1. Death; 2. Cashiering or dismissal. These punishments

<sup>1</sup> See the orders in the cases of Commander U. P. Levi of the Navy, and Capt. Drane, 5th Infantry.

are evidently different in kind, and are distinctively marked by the manner in which the law declares for particular offences, they shall be inflicted. Now it is argued, therefore, that such penalties, when adjudged by a court-martial, necessarily can admit of no mitigation, but must be executed, or entirely remitted. It is true that the substitution of a lighter punishment is, in a certain sense, a mitigation in favor of the prisoner; but it cannot be considered that mitigation of the punishment which is contemplated by law. Mitigation, in its legal acceptation, means a less degree of the same species of punishment; and were not such the true meaning of the word as there used, it would vest in the hands of the reviewing authority, the power to substitute any kind of punishment which, in his discretion, he might deem a mitigated one. If a prisoner were sentenced to suffer death, could it be considered a legal mitigation of the punishment to order the infliction of any number of stripes? Or should a commissioned officer be condemned to suffer death, where can the authority be found by which the mitigated punishment of cashiering might be substituted? In every punishment admitting of various degrees of intensity or severity, a mitigated form can be substituted: as, for instance; suspension from rank and command, with deprivation of pay, for one year, may be mitigated, in time, to six months, or without forfeiture of pay. Confinement at hard labor for six months, may be changed, in time, to two months, and so on. In such cases the species or kind of punishment remains unchanged, and the severity of the sentence is mitigated in ac-

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General remarks upon mitigation of punishment.

Punishments admitting of degrees of severity.

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cordance with law. But where a sentence is passed which can admit of no alteration without changing its character, the only means to shield the criminal, is to resort to the power of pardoning.

If the substitution of a minor penalty is permitted, on the ground that it is a mitigation of the original sentence, the discretion of the reviewing officer must be the means and guide to the selection of it. If so, it might happen under such authority, that a punishment could be inflicted which the law in no place recognizes as the penalty for any crime. The fact that the punishment is less onerous or painful than the one adjudged by the court, is the basis upon which is exercised the authority to act, and it must, consequently, be equally operative, whether such mitigated sentence be a customary, or acknowledged means of punishment, or not.

**Specific punishment for particular offences.**

Now there are offences for which the law provides a specific punishment,—and courts-martial have no power to adjudge any other. For such cases, how can the sentence be mitigated by any change which the reviewing officer might desire to effect? The discretion of the president is then annulled, and no authority is left with him, save, to order the execution of the sentence, or to pardon the offender.<sup>1</sup>

**Power of the president to pardon.**

The president possesses the power to pardon under the constitution, and is, by the same instrument, made the commander in chief of the army and navy; but there is no authority granted any where to him, to commute military

<sup>1</sup> Case of 2d. Lt. J. H. Carleton, 1st Dragoons. Gen. Order No. 24, 1843.

punishments; and it is a clear principle, "that the president has no powers, except those which he derives from the constitution and the laws of the United States. By the constitution, the president is made the commander in chief of the army and navy of the United States. But in a government limited like ours, it would not be safe to draw from this provision inferential powers, by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under the constitution, the president is the national and proper depository of the final appellate power, in all judicial matters touching the police of the army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from congress, the fountain of all law under the constitution."<sup>1</sup>

It has been said, that the change of a sentence in the manner referred to, is made by the president, not under the authority given to mitigate punishments, but by virtue of his prerogative as the chief magistrate of the nation. This answer made to the objection, yields the entire question. But there is a solid reply to this, which, if admitted, would concede a power still more objectionable than the first. The president of the United States is not, like the British sovereign, the fountain of honor, and therefore possesses no power of the kind. All his official acts derive their authority from positive laws; and prerogative or inherent right, or constructive authority, especially in the determination of questions of criminal justice, is not acknowl-

Objection to  
change of sen-  
tence.

<sup>1</sup> Mr. Wirt. Opinions, p. 172.

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Cannot inflict  
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ishment.

edged, and would be adverse to the principles of our government.

It may also be remarked, that there is no power lodged with any military functionary, to inflict arbitrary punishment. The law seems to have had in view the possible exercise of such authority, and accordingly has declared, that "no officer or soldier who shall be put in arrest, shall continue in confinement more than eight days, or until such time as a court-martial can be assembled." The principle involved in this act of the national legislature, is clearly, that no military person shall be subjected to arbitrary punishment, or without the intervention of a fair and impartial trial by a court-martial, according to the laws of the land.

This question, as to the right of the president to mitigate sentences of courts-martial, and the meaning of the power to mitigate, has frequently been presented for decision.

Case of Private  
William Barns-  
man.

1. In the case of private William Barnsman of the marine corps, who was adjudged to suffer death, the question whether the President could change that sentence into one of "service and restraint," &c., was submitted to Mr. Wirt, Att. Gen.

In the opinion given, (January 4, 1820,) it is stated—"the power of *pardoning the offence* does not, in my opinion, include the power of changing the punishment, but the power to mitigate the punishment decreed by a court-martial, cannot, I think, be fairly understood in any other sense than as meaning a power to substitute a milder punishment in the place of that decreed by the court-martial, in which sense it would justify the sentence which the president purpo-

ses to substitute in the case under consideration. The only doubt which occurs to me as possible in regard to this construction, is whether the power of mitigating a punishment, includes the power of *changing* its species; whether it means anything more than *lessening the quantity*, preserving, nevertheless, the *species of the punishment*. But there is nothing in the force of the terms in which the power is given, that ties us down to so narrow a construction.—It is proper to state, however, that a different construction is practically given to this power in the war department; for there the power of mitigation is not understood as giving the power to change the punishment.”<sup>1</sup>

2. Again, the question was presented, arising out of the case of Major William Whistler, 2nd regiment of infantry, (under the 83d article of war.) Mr. Berrien, the Attorney General, in giving his opinion said: “In those cases which, by the rules and articles of war, are required to be submitted to him, (and the sentences of a general court-martial in time of peace, and extending to the dismissal of a commissioned officer are among them,) the whole proceedings are required to be transmitted to the secretary of war, to be laid before the president, “for his confirmation or disapproval, and *orders in the case.*” The terms indicate an unlimited discretion; and when it is considered, that he is, by the constitution, the depositary of the pardoning power—that this is co-extensive with every species of punishment, except only in cases of impeachment, (and perhaps also for contempts

Case of Major William Whistler.

<sup>1</sup> Opinions, p. 238.



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against either house of congress,) it cannot, I think, be doubted that he has authority to mitigate, as well as to confirm or reject the sentence of a general court-martial, in the exercise of the supervisory power committed to him by the act for establishing rules and articles, for the government of the armies of the United States."

"It would be singular, if, in the cases which are entrusted to the supervision of a subordinate officer, (see 89th article of war,) a power should be given to him over the sentences of a court-martial, which is denied to the commander in chief, in those cases which are referred to him."

3. A more recent case than the above occurred, in which the power of the president over sentences of courts-martial, was again made the subject of inquiry.

Case of Com-  
mander Ram-  
say.

Commander William Ramsay, of the United States navy, was tried by a general court-martial, and sentenced "to be suspended from all rank and command in the navy of the United States, for and during the period of five years."

Upon a review of the case in July, 1843, the president ordered that the sentence be "commuted to suspension for six months, without pay."

It did not appear that the commutation of the sentence was made at Commander Ramsay's request; or that the condition was accepted by him. After the expiration of the sentence, in April, 1845, Commander Ramsay made application for his pay, and the question then arose—has the order of the President deprived him of his pay, for the six months during which he was suspended under the mitigated sentence—or in

<sup>1</sup> Opinions, pp. 731, 732.

other terms, had the President of the United States the legal power to deprive him of his pay for that time ?

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On the 10th of April, 1845, it was referred to the Attorney General, the Hon. J. Y. Mason, for an opinion.

In examining the subject, the attorney general refers to the case of the United States vs. Wilson, (Peters' Rep. 150,) and the definition given, by chief justice Marshall, of a pardon, and applying those principles to the circumstances of the case before him, remarks, that "the president did not exercise the pardoning power." The examination of the subject by the A. G. was full and able, and he concluded his remarks in the following language.

"When an officer is brought to trial, and is sentenced to be punished, the executive may mitigate the severity of that punishment,—but there is a guide—the discretion is a legal discretion—and the mitigation must not be according to a capricious will, but must have the sanction of the judgment of the court—it must inflict a part of the punishment awarded by the judgment, with the exception of those cases in which there is no degree—when the whole punishment must be inflicted, or no part of it can be—such is the case of a sentence of death."

"I am constrained to the opinion therefore, that Commander Ramsay is entitled to pay during the period mentioned in the 4th auditor's letter, notwithstanding the terms in which the president commuted his sentence."—(See Kennedy, pp. 236, 237.)

The above cases have been cited, and deemed

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Eighty-ninth  
article of war,  
and forty-second  
article for  
the government  
of the navy.

sufficient to show the reasoning, or the principles upon which the several opinions, in regard to this subject, have been founded.

It is well, however, to remark upon a fact, which has exerted some influence upon the judgment of the persons called to the consideration of the subject, that by the 42nd article of the "Act for the better government of the navy of the United States," of April 23, 1800, the President of the United States is in direct terms authorized, "to pardon or to mitigate the punishment decreed by a court-martial"—whereas by the 89th article of war, enacted for the government of the armies of the United States, April 10, 1806, the power to "pardon or mitigate any punishment ordered by such court," is only conferred upon "every officer authorized to order a general court martial."<sup>2</sup>

But notwithstanding this difference which exists in the language of the corresponding articles, intended for the government of the land and of the naval forces, there has never been a serious doubt of the power of the President of the United States to mitigate sentences ordered by army courts-martial; and this because such authority would of necessity attach to him as the first general under the constitution of the confederacy—and therefore the question has really been, as to the true or legal meaning of the *mitigation* of a sentence.

Remarks upon  
foregoing opin-  
ions.

In the arguments of the several attorney generals, to whom the question has been referred, the power of the president to mitigate a sen-

<sup>1</sup> Homan's Naval Laws, p. 66.

<sup>2</sup> Cross' Mil. Laws, p. 120.

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tence, by substituting a lighter punishment of a different species, has been claimed as a matter of expediency or convenience, and not as the direct inference of any legal or constitutional powers. And in one opinion quoted (2), it is said to exist in all cases, except in cases of impeachment, (which is a provision of the constitution,) and perhaps also for contempts against either house of Congress"—which is the mere notion of propriety of the writer.

But it must be observed that the defect of the law or the laws, does not cure itself; and while we most readily admit that such power, with certain limitations, would be rightly invested in the executive, and thereby in all such cases enable him to execute justice in mercy, still as the authority has not been given, it cannot of course be exerted.

Defect of a law  
does not cure  
itself.

Another objection against the exercise of such authority under the existing laws is, that it destroys, if conceded, the uniformity of a legal rule, and therefore the law is rendered capricious. It has never yet been maintained, that an officer having the power to pardon or mitigate the sentence of a court-martial (the sentence of death, or of cashiering an officer are excepted by the 89th article of war) could mitigate such sentence by substituting another punishment of a different species, but milder in character, nor has it ever been pretended that the president could change the kind of punishment when mitigating a sentence of any description. Now if the authority to act is thus restrained in one instance—and for which there is no special provision by law—why should it not

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be equally restrained in all other cases, where legislation has not permitted a wider discretion? If the president is to measure his authority by the particular circumstances of cases, it is evident that the rule is destroyed, and the only means left for his guidance is his own discretion—and yet the only answer which has been given, or can be given to the interrogatory above is, that it is convenient or expedient for the president to exercise such powers.

Powers of president derived from the constitution and the laws.

The leading principle for the government of the executive department is, that the president possesses no powers but what are derived from the constitution and the laws; and bearing this maxim in mind, should we refer to the country, from whence our fundamental laws were received, it will be seen that in analogous cases, the British sovereign is not permitted to commute the punishment of death decreed by a court-martial to transportation for life or a term of years, without the express sanction of parliament<sup>1</sup>—and were the rule endeavored to be sustained, against which the writer now argues, conceded, it would invest the head of a republic, with power which is denied to a kingly ruler—admit a principle in a government whose inception was based upon the limitation of arbitrary sway, which is rejected by the laws of a monarchy! Surely then, under this view of the subject, the right claimed for the chief magistrate of the nation, is opposed to the entire history and purposes of our civil polity.

It is a well understood maxim of law, that the sentence adjudged against a prisoner cannot

<sup>1</sup> Mutiny Act.

be commuted, or changed by substituting a punishment of another kind in its place ; and this is founded upon good reasons, as such power would necessarily divest punishments of judicial sanction. The power which is conveyed by the statute, to pardon or mitigate any sentence ordered by a court-martial, does not, therefore, give the power to commute such sentences,—for a very material difference exists between them. Pardon or remission of a sentence relieves the convict from the pains or penalty denounced against him ; and mitigation lessens the amount of punishment, though the part which is inflicted is authorized by the judgment or sentence of the court. Considerations of mercy enter into the exercise of these powers, and they cannot be employed to the prejudice of others. But the power to commute necessarily implies the power of causing the infliction of an arbitrary punishment, which has not previously received the sanction of any judicial tribunal.<sup>1</sup>

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Maxim of law,  
relative to com-  
mutation of  
punishment.

Punishment in-  
flicted to be au-  
thorized by the  
judgment of the  
court.

Further, it may be remarked, that the power to pardon “offences against the United States,” given to the president by the constitution, does not imply, or include the power to mitigate judicial sentences ; or else, the subsequent provisions of law<sup>2</sup> would be altogether supererogatory ; and hence it seems necessary to consider the words “to *mitigate* any punishment,” as technical, and meant to authorize the president, only to lessen the amount, but preserving the kind, or species of punishment decreed by the court.

Power to par-  
don does not in-  
clude the power  
to mitigate a  
sentence.

<sup>1</sup> Kennedy, p. 239.

<sup>2</sup> 42d Article of Regulations for the Navy, and 89th Article of War.

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If the pardoning power was not vested in the executive by the constitution, or the laws, it is evident that he could not dispense justice in that form; and if the pardoning power included likewise the power to commute sentences, there would be no purpose or object attained in giving him a special authority to mitigate such sentences. It is believed that this power has never been conceded, in matters pertaining to the civil departments of life, under any system of American or English jurisprudence, to the head or executive of any government;—for such concession would be to put the arbitrary will or discretion of an individual in opposition to the declared sanctions of the law, while no such will, or discretion, had been acknowledged by legislative enactment!

Such are the views of the author in regard to this question, and the principles and reasoning which have led him to the conclusions expressed in the foregoing pages; and it is with great deference, and hesitation, considering the weight of authority by which a contrary opinion has been maintained, that he now submits them for the consideration of the reader.

Proceedings of  
courts-martial  
not subject to  
review by an-  
other court.

The proceedings of a court-martial having been finally disposed of by the officer ordering the court, are not liable to be reviewed by any other authority—that is, there is no court in which any appeal against the sentence of a court-martial can be brought, nor in which it may be revised.<sup>1</sup>

The officer (of the required rank) who suc-

<sup>1</sup> With the exception of the right of appeal from the judgment of a regimental court-martial, under the 35th Article of War.

ceeds, in command, to a general commanding an army, or a colonel commanding a department, occupies the same position in relation to all judicial functions,<sup>1</sup> and may exercise the same powers as his predecessor: but although this successor may pardon or mitigate any punishment (excepting sentences of death, and cashiering a commissioned officer) which has been ordered by a court-martial, and approved or confirmed by the first, still he may not arraign or impugn the propriety, or motives which induced the first decision. The legal discretion to decide having been invested in the first, his confirmation of the proceedings is decisive, and the trial thereby completed. Should it appear that an error has been committed, the remedy for the wrong is to be found in the power to pardon or mitigate the sentence; but an examination or review of the reasons and acts of the previous commander is not allowable.<sup>2</sup>

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Successor in command exercises the same powers. Cannot review the judicial act of predecessor.

The proceedings, or record of every court-martial, are sent to the head quarters of the officer by whose authority the court was appointed, and finally deposited in the war department; where, upon demand of the party tried, or by any person in his behalf, a copy of the sentence and proceedings of the court-martial will be furnished.<sup>3</sup>

Record deposited in the war department.

In connection with the subject just considered, there is, incidentally, presented to our notice another of vast importance, and one in which

<sup>1</sup> 65th Article of War.

<sup>2</sup> See case of Assistant Surgeon Stevenson, Eastern Department, Order of April 4, 1829, in which this principle seems to have been to some degree overlooked.

<sup>3</sup> 90th Article of War.



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Question as to  
the right or  
power of the  
president to dis-  
miss an officer  
without trial.

every officer of the army and navy has a high and abiding interest. From the intrinsic importance of it, the various and conflicting opinions which exist in relation to it, even in the military service; and the views under which it was supposed to have had a partial settlement, as well as the practice which, to a limited extent, has obtained,—the writer is induced to present it to the consideration of the reader.

The question then, which is now to be considered for a brief space, is as to the legal right of the president of the United States to dismiss from the service, without trial, a commissioned officer of the army or navy.

This power has been assumed for the president, and acted upon in various instances; and apparently relying altogether upon the basis of a construction given to the constitution by congress, on the first organization of the government. The question then was, whether the president could dismiss from office, persons who were appointed by and with the consent of the senate, without the consent of the senate, likewise, to such removal. Such was the construction of the constitution while it was pending for ratification before the state conventions, by the "*Federalist*," and it is therein observed: "The consent of the senate would be necessary to displace as well as to appoint;" and that, "those who can best estimate the value of a steady administration, will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body, which, from the greater permanency of its own composition, will, in all

probability, be less subject to inconstancy than any other member of the government."<sup>1</sup>

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In organizing the departments of the executive, the question, in what manner the high officers who filled them should be removeable, came on to be discussed.

In a committee of the whole house on the bill "to establish an executive department, to be denominated the department of foreign affairs," (afterwards denominated the department of state,) Mr. White moved to strike out the clause which declared the secretary to be removeable by the president.

It was contended, that such power was not placed in the president alone.

"In the power over all the executive officers, which the bill proposed to confer upon the president, the most alarming dangers to liberty were perceived. It was in the nature of a monarchical prerogative, and would convert them into the mere tools and creatures of his will. A dependence so servile on one individual, would deter men of high and honorable minds from engaging in the public service; and if, contrary to expectation, such men should be brought into office, they would be reduced to the necessity of sacrificing every principle of independence to the will of the chief magistrate, or of exposing themselves to the disgrace of being removed from office, and that too at a time when it might be no longer in their power to engage in other pursuits."

On that part of the constitution which vests the executive power in the president, the friends

<sup>1</sup> Federalist, No. 77.

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of the original bill founded their arguments principally; and the amendment was negatived by a majority of thirty-four to twenty.

Subsequently the bill, on motion of Mr. Benson, (seconded by Mr. Madison) was so amended, as clearly to imply the power of removal to be solely in the president. The amendment was adopted, and the bill passed into a law.<sup>1</sup>

Such was the declaration of the opinion, upon the subject, by congress. If we look to the remarks, quoted above, against the acknowledgment of such authority in the hands of the president, we cannot but be struck by their peculiar appropriateness to officers of the military service; and if the question in debate had had reference to them, (which it had not, but was exclusively pertaining to officers of the executive, civil departments of the government,) they could not have been more just and forcible. In the condition, obligations, duties and rights (either inferentially deduced, or by express legal provisions,) of military persons, and those occupying places in the civil departments, we perceive so wide a difference and strong a contrast, that the argument above referred to is pointedly apposite. The first occupy a very different position, both from the nature of their employment, and the means of their regulation or government, from the latter, who fill places of civil trust. To such as the discussion, at the time alluded to, had special reference, they were appointed by the president as aids in the administration of the government, and for the proper and becoming

<sup>1</sup> Marshall's *Life of Washington*, Vol. V., chap. iii., pp. 196

exercise of all its powers he is justly held responsible; and, therefore, it was, in reference to civil officers, conceded, that for the faithful execution of the law, the power of removal was incidental to that duty, and might often be requisite to fulfil it.

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But there is and can be, no necessity for a like concession of right to the executive, in relation to the members of the military service. They are but the mere actors in a subordinate sphere; harmony of opinions between them and the executive is not requisite for any administrative act or measure of government; and though the president is responsible to the nation for the general direction of the military forces, yet he is not so for their individual conduct; because every officer in his personal relations to the government, is made a part of a legally organized body, and held accountable for his acts by a distinct penal code, which has provided the means of trial, and mode of punishment, for every breach of discipline and good order, and for every misdemeanor or crime, of which he may be guilty.

There is no other particular class of men, for whom legislation has prescribed a specific regulation; and therefore, it seems to be a just conclusion, that for any offence or offences, contemplated by such regulation, (and the military statutes cover the entire conduct of commissioned officers, of the army and navy,) they can only be tried or punished, in the manner in which the law declares they shall be tried and punished.

But the legislative construction of the consti-

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tution, as referred to above, has ever since been acquiesced in, and acted upon, as of decisive authority in the case ; still, it is to be remarked, as a striking feature which distinguishes the rule, that the power, by which it is made operative, is purely inferential.

In commenting upon the powers of the president, a very eminent jurist,<sup>1</sup> in reference to this question, makes these observations :—

“This question has never been made the subject of judicial discussion, and the construction given to the constitution in 1789, has continued to rest on this loose incidental declaratory opinion of congress, and the sense and practice of government since that time. It may now be considered as firmly and definitely settled, and I entertain no manner of doubt of the good sense and practical utility of the construction. It is, however, a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the president alone, the tenure of every executive officer appointed by the president and senate, should depend upon inference merely, and should have been gratuitously declared by the first congress, in opposition to the high authority of the *Federalist* ; and should have been supported or acquiesced in by some of those distinguished men who questioned or denied the power of congress, even to incorporate a national bank.”

It is very evident, from the above extract, that the distinguished writer doubted the legal propriety of the construction adopted by congress,

<sup>1</sup> 1 Kent's Commentaries, 290.

though he is willing to acquiesce in the decision from considerations of public expediency, or practical utility ; still the views here expressed, must have reference to executive officers of the civil departments, and the authority, granted by the interpretation given, should therefore be applicable to no other class.

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But the same expediency, or practical utility, does not exist in the case of officers of the military departments of the government, and from which the rule or construction, as applicable to other descriptions of public functionaries, derives much of its vitality—and this because the legally established tribunal can always be convoked for the doing of justice, in the manner pointed out by the laws, in all cases of military delinquencies ; or, if delay be of necessity, it can only be in times of unusual and extraordinary emergencies, and even then of no very long continuance.

The following cases may serve to illustrate more forcibly, the propriety, safety and justice, of referring at all times, to the regularly appointed court for the administration of military justice.

1. Consequent to the investigation of a court of inquiry, held in July, 1821, Captain Daniel Curtis, of the second regiment of infantry, was dismissed the service by order of President Monroe, October 16, 1821. And on the 8th day of the following April, no promotion having been in the meantime made to his place, he was restored, at his own request, to the army, by the president, for trial. On the 17th April, 1822, a general court-martial was appointed, before

Case of Capt.  
D. Curtis.

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which he was arraigned, and tried, and being duly convicted of the offences alleged against him, was sentenced to be cashiered:—which sentence was duly confirmed by the president, and carried into execution.

Case of Major  
William Gates.

2. A court of inquiry was instituted in the spring of 1836, to investigate certain imputations against Major William Gates, of the 1st regiment of artillery; and upon the proceedings of the court, he was dismissed the service, June 7th, 1836, by order of President Jackson. Upon further consideration of the case, Major Gates was re-appointed a major in the 2nd regiment of artillery, to date with his former commission, which re-appointment was confirmed by the senate; and a general court-martial having been appointed, February 7th, 1837, for his trial, he was, after a patient investigation of the charges preferred against him, *found not guilty, and honorably acquitted!*

The above cases may present the rule now advocated in a favorable light. In the first instance, it is perceived, that there was not a necessity for dismissing the officer without trial, as a court-martial was readily assembled, which, in its procedure, sanctioned by its sentence, a proper punishment, and vindicated the discipline of the service. No right was thereby restrained, no wrong inflicted, but on the contrary, by submitting the case to a legal tribunal, private interests were protected, and public justice satisfied.

But in the second instance, although there was a parallelism in many features with the other, yet in the results there was a wide di-

vergency. Upon precisely the same description of preliminary proceedings, a like command had been given that the accused should be stricken from the rolls of the army; and yet, in the latter case, when an appeal was made to a general court-martial, and which court might have been at any previous time assembled without difficulty, how different the judgment! Circumstances, facts, and arguments, were then presented, which, in the less formal conduct of a mere inquiry had been overlooked or disregarded; and the verdict of the court in saving an officer from poverty and disgrace, exemplified in that emphatic fact, the justice of the law,—the law to which every officer looks for protection—by which the just measure of his conduct is determined, or the penalty for crime apportioned!

The author had proceeded thus far, when the following able paper, addressed to the secretary of war, under date of April 23, 1845, by a highly distinguished citizen was furnished;<sup>1</sup> and being kindly permitted to introduce the same to the notice of the reader, he now would make a becoming acknowledgment of the same.

Letter to Secretary of War on the subject of dismissal without trial.

The opinion thus presented, will be seen to cover more in detail the question in discussion; is reasoned with logical precision, and stated in simple and vigorous language.

The papers submitted, and upon which the argument is presented, are,

1. Letter from a gentleman of Springfield, Massachusetts, April 18, 1845, claiming for the president the right to dismiss the store-keeper there;—2. Letter dismissing Mr. Charles Little,

<sup>1</sup> Major-general Winfield Scott.



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store-keeper, August 28, 1835 ;—and, 3. Opinion of Mr. Attorney General Butler, February 25, 1837, on which Mr. Little was restored to office.

The writer thus remarks :—

Opinion and ar-  
gument.

“ These papers have been referred to me by the secretary of war. They present a grave question—one that has been little discussed, and only, as far as I know, between President Adams and myself in 1828. On that occasion the president *practically* admitted his want of power to dismiss, without a judicial sentence to that effect.

“ I am aware that many presidents have exercised the power in question. But a strong negative is found in the fact that every officer so dismissed from the army, has, on a demand to that effect, been restored and allowed the benefit of a trial by his peers ! The dismissed officers who neglected to make such demand, and who, therefore, were never restored, probably looked upon their arbitrary dismissal as an act of mercy to themselves respectively, as covering up the details of guilt and shame which otherwise would have gone on judicial record and been made perpetual.

“ I do not mean to discuss the question of ‘removals,’ or the power to dismiss from the public service in general. *That* has been elaborately argued and reviewed at different periods, and perhaps yet remains an open question. I shall confine this brief to the tenure of the commissioned officers of the army, which rests on *special* grounds.

“ An army in a republic, it will be admitted, is a delicate—nay, a most dangerous machine, unless held in the strictest discipline—i. e., in the

strictest obedience to the constitution and the laws. It is equally essential to the good of a republic, that its army should also not be a *slavish machine*; that all arbitrary and capricious action over it should be excluded; that it be at all times under the government of fixed and constitutional authority. *Misera est servitus ubi jus est aut vagum aut incognitum.*

“ ‘The government, [with us the legislature,] ought precisely to *determine* the functions, duties, and rights of military men—soldiers, officers, chiefs of corps, generals.’—*Vattel.*

“ ‘The congress shall have power to make rules for the government and regulation of the land and naval forces.’

“ ‘This power was taken up, and for the time being in respect to the army exhausted by the act (commonly called *the rules and articles of war*<sup>1</sup>) of April 16, 1806.—*Cross*’ Mil. Laws, pp. 107, 123.

“ ‘It is of the very essence of ‘rules for the government of’ the public forces that they should define and prohibit *offences*—prescribe *penalties*, and in addition, designate the *tribunal* which is to ascertain such offences and apply the prescribed penalties.

“ ‘Now all this is clearly done in the act of 1806. Congress has therein carefully enumerated and defined every *possible* act which it chose to consider an offence in the military state, or land forces; and, to exclude all arbitrary action, has placed in juxtaposition with

<sup>1</sup> Established, by the old congress, June 30, 1775, November 7, 1775, September 20, 1776, &c., &c., which were recognized under the constitution by the act, Sept. 29, 1789.—*Cross*, p. 41.

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each and every offence so created—in the same article—the tribunal (a court martial and not the president) to judge the alleged offence and to apply the prescribed punishment. How can that connection, in a constitutional act, and therefore part of the ‘supreme law of the land,’ be legally dislocated, (except by another such act,) and the president seize upon a jurisdiction so carefully lodged in other hands?

“A remarkable legislative construction, supporting—nay, *establishing* my view of the power in question—is found in the ‘act concerning the disbursement of public money,’ Jan. 31, 1823, sect. 3, *Cross*, p. 216. Here an offence, previously created and made punishable only by a court, under the 39th art. of war (*Cross*, p. 114) is, by special dislocation, to ‘be *promptly* reported to the president of the U. S. and [the offender] dismissed from the public service.’ (This power has, in the case of quartermaster Captain Davis, been exercised within a week. The dismission could only have been summarily made by direction of law.)

“General courts-martial must, under the 64th article of war, (*Cross*, p. 117,) consist of from five to thirteen members, each taking an oath (69th article) to ‘try and determine’ according to the rules and articles, ‘and if any doubt shall arise, not explained by the said articles, according to your conscience, the best of your understanding, and *the customs of war in like cases*,’ or what may be termed the common law of the army.

“This *common law* is recognized by Mr. Attorney General Wirt, April 5, 1824. And again,

Feb. 20, 1828, he distrusts his 'own judgment' in reference to 'the existing usage and practice of the army, known only to *military* men.'—*Opinions of Attorneys General*, pp. 489, 596.

"No sentence of a court martial, 'in time of peace, extending to the loss of life or the *dismissal* of a commissioned officer, or which shall—either in time of peace or war—respect a general officer, be carried into execution until after the whole proceedings [of the court] shall have been laid before the president of the U. S. for his confirmation or disapproval, and orders in the case.'—65th article, *Cross*, p. 117.

"Here is extreme care taken by congress of the commission of an officer—often more dear to him than life—even after it has been submitted to the judgment of his peers.

"In respect to the army and navy, the president is only the '*first general and admiral of the Confederacy*.' *Federalist*, No. 69, by General Hamilton—written in 1788, pending the question—shall the constitution be adopted? in order to dispel the fear that the president would become, like George III, the fountain of all honor and power over the army and navy. Indeed it was only as the 'first general' that the president ever appointed a general court-martial down to 1830; for the 65th article of war only gives that power, in terms—to 'any general commanding an army, or colonel commanding a separate department.' In a certain class of cases, provided for in the new and anomalous act, May 29, 1830, sect. 1., (*Cross*, p. 225,) the power to appoint courts is first given to the president *in terms*.

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"What power has the 'first general,' or any officer, over the army, except such as is clearly derived from the constitution or laws?"

"In all cases (except those arising under the act of 1823, respecting the settlement of accounts) it has been shown that trial *by a court*, is as much a part of the rules and articles of war as the *offences* therein severally created, or the *punishments* to be decreed.

"Suppose a court sentence an officer to a year's suspension; would any president think of substituting the higher punishment of dismissal?"

"But it may be contended that if the president cannot summarily dismiss for any *statutory* offence, other than that created by the act of 1823 (non-settlement of accounts) he may, nevertheless, exercise that power without the assignment of *any* cause.

"Besides the reply that no such case has ever occurred in the army—that attribution of prerogative to the president would give him a power over an unaccused and innocent officer, which he could not have exercised over the greatest and most apparent guilt—the cowardice or treason of a Hull! The surrenderer of Detroit was tried by a general court-martial, and was only *dismissed in mitigation of the sentence which doomed him to die!*

"The 5th amendment of the constitution, only excepts from a preliminary presentment by grand juries, cases arising in the land or naval forces; and does not take away from their officers the benefit of a trial in chief by their respective peers.

"Mr. Attorney General Butler's opinion before me admits that military store-keepers are duly 'appointed by the president and senate, *commissioned* and sworn.' And being further placed under the rules and articles of war, it follows that they are as much officers of the army as our generals.—(See Army Register, p. 10.)

"But Mr. Attorney General Butler, speaking of store-keeper Little, adds:—'He was liable, like *all* other officers, to be dismissed by the president!' Mr. Butler had, evidently, never investigated the question of power, but decides that the power, in point of fact, had not been exercised, and, therefore, that Mr. Little was still in service!

"I have omitted to state that the power in question has been claimed for the president, but never exercised, under two other heads:

"1. *Under the 11th article of war*, (Cross, p. 109.)—Every individual who enters the army by enlistment or by commission, is held to remain in it, under the penalty of being considered a *deserter*, until *regularly* discharged. Non-commissioned officers, musicians, privates, &c., &c., (enlisted men,) receive a formal paper called a *discharge*, signed as the article directs, at the end of the engagement of each; or, if by sentence of a court, *the order*, in the case, is such *discharge*. *Commissioned* officers are 'discharged' in three ways: 1. Upon tender and acceptance of commissions—called *resignations*; 2. Partial reductions or disbandments of the army, when all surplus officers go out, and are declared by the president, in orders, to be *honor-*

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*ably* discharged; 3. Sentences of general courts-martial, when the term *honorable* is, of course, omitted. In all three cases, the officers are put out by order of the president giving the *discharges*.

"But it may be said, if, in each class of the cases—the last, as in the first and second, the president gives the order of discharge, why does the article specify 'by sentence of a general court-martial'? Because in time of war (see 65th article) a general officer in command of a particular army, &c., &c., has also the power to discharge a commissioned officer, sentenced to be dismissed by such court; and but for the words, in the 11th, 'by sentence of a general court-martial,' this article would not have been in harmony with the 65th.

"The 11th article, therefore, gives no power to the president to make arbitrary *discharges* of officers—in other words *dismissions*.

"2. *The words found in every officer's parchment*:—'This commission to continue in force during the pleasure of the president of the U. S. for the time being.'

"This *durante bene placito* would seem to conclude the question, and it certainly would be conclusive, if those words were, in any manner, founded on, or derived from, specific legislation.

"June 17, 1775, a committee, appointed for the purpose, submitted to congress the draught of a commission for General Washington, which was adopted. (Journals, vol. 1, p. 85.) This draught, in all its formal parts, was closely copied from British commissions, (there were at least twenty members who had held such,) sub-

stituting in the closing words—‘This commission to continue in force until revoked by this or a future congress.’ And congress then, and down to the adoption of the present constitution, it will be remembered, exercised over the federal forces, all the powers of the British king and parliament united.

“That draught was substantially followed in all army commissions given by the old congress.

“Since the adoption of the constitution of the United States, there has been, absolutely, not a syllable of legislation on the form of army commissions. The old form has been continued, substituting ‘the president of the United States,’ for *the king*, (in the sentence quoted, and originally borrowed from British commissions.) This probably was the pen-work of some clerk, or at most, the hasty direction of the secretary of war, without reflecting that the chief magistrate, in a republic, is not the fountain of all honor and power.”



## CHAPTER XI.

### EXECUTION OF SENTENCE.

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Execution of  
sentence.

THE sentence of a court-martial having been confirmed, the next step is to carry it into execution. It is a matter of importance, that the moral effect of punishment be not lost to the soldiery, upon whom the example is designed to operate, by any carelessness or levity exhibited at the time of its infliction; and for that reason, in the armies of all nations, the execution of judicial sentences has been marked by solemnities and ceremonies. The order of military exhibitions is, in its nature, one of ceremonial, and the precision and formality which are observed on ordinary occasions, should not be wanting upon occasions where the object is to impress the minds of the spectators with seriousness and awe.

Corporal punishment, how inflicted. Punishment must not be prolonged.

When the sentence awarded is corporal punishment, the troops of the regiment or garrison are drawn up to receive the prisoner, usually in some retired spot, as the ditch of an outwork, to which place he is conducted by a guard or escort. Upon his arrival at the place of punishment, the adjutant, or other staff officer, reads the sentence of the court, and its approval; the prisoner, during the time occupied in reading, standing uncovered, and advanced a couple of paces in front of the escort. He is then ordered

to strip to the waist, and is tied to a machine called a triangle, which is formed of three legs, connected by a bolt at the top, and separated about four feet at the bottom. A bar is fastened at a proper height to two of the legs, against which the prisoner may lean his breast, who is tied by the ancles to the legs of the machine, and his hands secured above. Sometimes the prisoner is lashed to a gun-wheel. The strokes with the cat-o'-nine-tails are delivered upon the bare shoulders, by the drummer or trumpeter. The drum or trumpet-major counts each lash, giving sufficient time for the executioner to pause between the strokes, equal in duration to three paces in slow time, which is marked by taps of the drum, or by the executioner encircling the cat round his head. A medical officer is invariably required to attend, to superintend the punishment. Should any appearances indicate the propriety of suspending the infliction, the medical officer reports to the senior officer on parade, who gives orders accordingly. It is well understood, that to prolong the punishment beyond the usual time would be highly improper, and subject the officer, who authorized or caused such to be done, to charges.

All means used to cause greater pain to the sufferer, than what must necessarily follow the infliction by the usual instrument of punishment, is strictly forbidden; and, therefore, the preparation of the cats by steeping them in brine, or washing them in salt and water during the punishment, would not be countenanced. It is a well known principle, that punishment is shorn of its efficacy by a resort to cruel and inhuman

Means to cause  
unusual pain  
forbidden.

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means ; and the criminal, in such cases, is no longer viewed by the by-standers as a malefactor, but is sympathized with as an oppressed and wronged creature. During the infliction of the punishment, it is necessary that the drum-major should see that the strands of the cat are not entangled, so as to produce too heavy a blow ;—they should be kept separated, and, if necessary, washed in water.

Cat-o'-nine-tails.

The cat-o'-nine-tails, the usual instrument for flogging, is composed, as its name imports, of nine lashes of whip cord, each knotted in three places, one knot being near the end ; the lashes are sixteen to eighteen inches long, and fastened to a handle of wood, of about a drumstick's length. Common whip cord is the thickness allowed ; a larger description would too much bruise and lacerate the flesh by its weight.

No more punishment than the prisoner can bear at one time inflicted.

It is a rule now adopted for the regulation of corporal punishment, that no greater amount shall be inflicted than what the prisoner is able to undergo at one time. Should, therefore, any number of stripes less than what the sentence prescribes, be more than could be given at any time, in reference to the physical ability of the prisoner to bear, such number must be considered as remitted, and the punishment complete. This rule is a humane one, and it may fairly be argued, that whenever the punishment administered is equal to the strength of the culprit to bear, that the ends of punishment, as far, at least, as he is concerned, have been attained. It is not very likely that such cases, from the limited number of stripes (fifty) which may be inflicted, will often happen. The writer, how-

ever, has witnessed an instance in which, from the great excitability of the prisoner, no more than forty stripes could be given with safety.

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In the British army, where, until a few years ago, corporal punishment was inflicted to a degree which shocked the sensibilities of every humane person, such rule was of the highest importance. Soldiers in that service were frequently removed from the place of punishment a bruised, bleeding, senseless mass of flesh. One thousand,—five hundred,—three hundred lashes, have been ordered and carried into execution with a merciless severity. Against such a system of punishment, officers of that army took ground, and with a zeal creditable to their humanity, many of its distinguished members, urged a modification of the rules of service, and the adoption of a more merciful code.

Modification of  
punishment by  
stripes in the  
British army.

The rule itself, adverted to above, was a consequence of the excessive punishment authorized and inflicted by stripes in the British army, and remedied to some extent the rigorous custom which then prevailed.

When capital punishment is to be inflicted, great ceremony is made of special observance. When a criminal is to be put to death by shooting, the troops to witness the execution are formed on three sides of a square. The prisoner, escorted by a detachment, is brought on the ground. The provost marshal leads the procession, followed by the band or field music of the regiment to which the convict belongs, drums muffled, playing the dead march. The party detailed to fire, consisting usually of eight to twelve men, comes next;

Capital punishment—shoot-  
ing.

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then four bearers with the coffin, and immediately after the prisoner attended by a chaplain; the escort closes the rear. The procession passes in front and along the three sides of the square facing inwards. On arriving at the flank of each regiment the band of that regiment plays the dead march, and continues until its front is cleared. When the procession has reached the open space, the music ceases; the prisoner is placed on the fatal spot where the coffin has been put down, and the charge, sentence, and order for the execution read aloud. The chaplain having engaged in prayer with the condemned, retires. The execution party forms at about six paces from the prisoner, and the word is given by the provost marshal. When the firing party forms, the escort moves by the right flank and takes position in rear of that party, at ordered arms. Should the fire not prove instantaneously fatal, it is the duty of the provost marshal, or a file which has been reserved for such duty, to complete the sentence. The execution being over, the troops break into column by the right and move past the corpse in slow time.

**Hanging.**

When death by hanging is to be inflicted, the troops are formed in square on the gallows as a centre. The prisoner, with the escort, having arrived at their respective places, the charge, sentence, and warrant are read aloud, and the executioner, under the direction of the provost marshal, performs his office. The troops march off the ground at common time; the provost marshal with the escort, remaining until the body is taken down.

Soldiers sometimes for disgraceful conduct are discharged the service with ignominy. A sentence of this kind is executed as follows. The troops being assembled, the offender is brought forward in charge of a guard, when the offences of which he has been found guilty, together with the sentence and its approval are read. The facings, &c., of his dress are stripped off; and he is then trumpeted or drummed out with the "rogue's march," through the barracks or quarters of the corps.

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Degradation  
and drumming  
out of service

When a soldier is sentenced to close confinement in the cells, if sickness should require him to be removed to the hospital, he would upon recovery of his health be returned to imprisonment for the remainder of his sentence; but the time of his being in hospital must be computed as part of his imprisonment. When in hospital he is deemed a prisoner.

Confinement or  
imprisonment.

A commanding officer would not be justified in releasing prisoners under sentence, allowing them to do duty in presence of the enemy, or at other times, and afterwards inflicting the punishment.

Commanding  
officer not to  
release prisoners  
of service  
and afterwards  
inflict punishment.

As there are no particular places provided for the imprisonment of soldiers by sentence of courts-martial, it is never stated where the confinement shall be undergone, but is left to the commanding officer of the garrison wherever the prisoner may be, (unless specially ordered to be removed to another station,) to carry out the sentence by the means within his control. It consequently does not interfere with the right to change the place of imprisonment, should the regiment be removed, or other causes render it

Place of confinement  
may be changed.

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necessary. In such cases, for ordinary close confinement, the time occupied in effecting the change of place would be counted in the sentence; but where solitary confinement with low diet is the sentence, the prescribed number of days, according to the judgment of the court must be fulfilled.

Punishment to  
be strictly ex-  
ecuted.

In the rigid execution of sentences awarded by military courts, is the most effectual means of preventing offences. It is much to be regretted, as a cause in frequent instances of the slight effect, either as punishment or example, which the decisions of courts-martial produce, that they are not strictly executed. In the case of commissioned officers the weight of the sentence is felt in all its force; but with the enlisted men, who are of course subject to a different species of punishment, the results to them of a trial are little more than nominal.

The causes which lead to this unfortunate result are to be found in the great dispersion of the military forces, and the frequent removals and changes incident to our service. There are but few stations which can be considered as permanent, and the greater number of these are not provided with those means of carrying out the sentences of courts-martial, which a proper regard for subordination and good discipline so much require. It may also be surmised that the quantum and kind of punishment authorized to be inflicted for certain species of offences, are not altogether such as are most wanted to ensure military obedience; and public opinion at the present day, based upon what is termed a just *liberty of thought and action*, has not only

Evils of false  
opinions on mil-  
itary punish-  
ments.

very much modified all penal legislation, but independent of that, has to some degree worked a corrupting influence upon the minds of the soldiery themselves. This evil would no doubt, in times of active and perilous service, be much overcome ; but nothing less than the necessities of war could reconcile the change to the public mind, or rather to the mind of our legislators.

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In a system which should combine precision and certainty for the jurisprudence of the army, would the country find and secure the high interests of good order and economy,—interests which, while they would not stand in opposition to any personal rights, or humane government, would be doubly appreciated by being associated and connected with all the lofty and enduring benefits which other nations have gained, or hope to acquire, by a well regulated army.

Benefits to be  
derived from a  
precise system  
of military law.



## CHAPTER XII.

### OF REDRESSING WRONGS, AND APPEALS FROM A REGIMENTAL COURT-MARTIAL TO A GENERAL COURT-MARTIAL.

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XII.  
Redress of  
wrongs.

THE 34th and 35th articles of war were especially framed to afford a speedy and efficacious remedy, to officers and soldiers, who are, or who think themselves oppressed and aggrieved by their superiors. These afford the opportunity to the authors of the injury complained of, to repair it by their own act, or authorize the carrying of the complaint to higher authority, by the sufferer, or make positive the obligation to call a regimental court-martial, without qualification or condition, to do justice to the complainant, upon the preferment of the complaint to the commander of the regiment.

Preference given to inferior officers and soldiers.

It may be observed in the character and language of the two articles referred to, that a preference is given to the inferior officers or soldiers, in hearing and determining their grievances, by making an investigation of the same demandable in the first instance as a matter of right. When the reciprocal relations of the officer and soldier are considered, and the influence which the position of the first must exercise over those subjected to his command, it will be conceded that the preference is not only a just, but a necessary one. The soldier, in his subordinate station,

enjoys the comfortable assurance of protection, and the officer, if any be inclined to oppression, is restrained in his actions by the knowledge of the existence of such a right, which can, at any time, be exercised for the remedy of wrongs. But the just and equitable mode of discipline observed in our army, has made a reference to this right on the part of the soldier, a very rare occurrence; and the disposition of the officers, in regard to their men, is in itself a pretty sure guaranty against oppression.

By the 34th article of war, it is declared:—

Thirty-fourth  
article of war.

“If any officer shall think himself wronged by his colonel, or the commanding officer of the regiment, and shall, upon due application being made to him, be refused redress, he may complain to the general commanding in the state or territory where such regiment shall be stationed, in order to obtain justice; who is hereby required to examine into the said complaint, and take proper measures for redressing the wrong complained of, and transmit, as soon as possible, to the department of war, a true state of such complaint, with the proceedings had thereon.”

In a preceding part of this work, (chap. VI., pp. 77, 78,) reference is made to this particular article, and it is there stated, that the application of it is proper in cases of wrong inflicted by superior officers of whatever grade. It is also observed, that no discretion is allowed to the general to whom complaint is made, to arbitrarily dispose of it by his own will. This latter part must be understood with some limitation. It is undoubtedly required of him “to examine

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Complaints to  
be examined  
into.

into the complaint, and take proper measures for redressing the wrong complained of," and it is from this very duty enjoined upon him, that a discretion is vested of judging of the truth or not of the complaint, and accordingly either forward or not, the state of the complaint to the department of war, for further inquiry. If the charge laid should be incapable of proof, or the grievances stated not amount to a crime or offence, at least of military cognizance, it cannot be supposed that it was intended to trouble the department with a report. This conclusion is the more truthful, inasmuch as the complainant is not thereby debarred, of either the right or the means of preferring his complaint again to the highest authority.

In cases where the complaint is not transmitted to the department of war by the general, the latter, upon a due consideration of all the facts and circumstances laid before him, and concluding, therefrom, that a misconception exists in the mind of the complainant, frequently, or usually returns the accusatory communication to the author, with an admonition sometimes, that it may be withdrawn—or peremptorily refuses to transmit it, with his report, to the war department. And in no instance could this be prejudicial to the complainant, because, as has been observed, he can reiterate his complaint, should he not accede to the recommendation or primary decision of the general. Should the general, upon a second application, still refuse to forward the complaint, the officer making it may address himself directly to the war de-

Direct applica-  
tion for redress  
to war depart-  
ment.

partment, through the office of the adjutant general of the army.<sup>1</sup>

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XII.

The article requires, in the first place, that the complaint should be lodged with the colonel or officer commanding the regiment, and application be made to him for redress. This pro-

Complaint to be first laid before the commander of the regiment.

highly becoming and discreet, as it affords an opportunity, where offences have been recently committed, for reparation by the complainant, and thus saves the service from being harassed by vexatious actions: and upon redress being refused that the complainant is authorized to prefer his charge to the general. The particulars of the grievance should be formally stated to the colonel in writing, and the alleged grievance,—so that he may understand the ground of complaint, and may require or expected redress, and thus

Grievance formally stated.

be able to regulate himself accordingly. If, after such application for reparation of the wrong suffered, the colonel, or commanding officer, should refuse to redress the same, the complainant may make his statement of it to the general. The refusal must be an absolute one, or there must be such a neglect of the application, on the part of the commanding officer, as shall constructively amount to a denial of justice.

When reparation is refused can apply to the higher authority.

It must be understood, however, that the colonel or commanding officer must be the *medium* of communication to the general, and that the complaint so preferred be also identical, or the same in substance, with that submitted in the first instance. The first requirement is

Commander of the regiment the medium of communication.

<sup>1</sup> Samuel's Law Military, pp. 502, 503.

19 November 1967

(Hence the name of the House of Commons)

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necessary for a proper observance of the general regulations for the army, a violation of which would subject the offender to punishment: and the second is due to the commanding officer himself, who may thus have further space for repentance of his first decision, and opportunity of accompanying the complaint with explanations of his own conduct.

The mode here pointed out is in strict accordance with the article and the general regulations of the service, (G. R. par. 790,) and it is only by a consistent observance of them that the benefits, sought under the particular article of war, the subject of these remarks, can be obtained without delay, and inconvenient embarrassment.

Thirty-fifth article of war.

The succeeding article of war, to wit, the 35th, requires particular attention; the more so from the infrequency of any action under it, and the unsettled, or mistaken, or indeed careless opinions, which have hitherto been entertained respecting its true purposes or meaning. The article in question was originally adopted from the British articles of war, by a resolution of the American congress, September 20, 1776, and thus incorporated with our military code. By a subsequent act of the national legislature, (April 10, 1806,) it was varied in its terms, by the omission of the words,—“commanding the troop or company to which he belongs,” but without varying the import or intention of the article in the slightest degree, as will be presently shown when we proceed to its interpretation.

Origin of the thirty-fifth article.

A law of this description, which is intended

for the individual soldier, as a protection against wrong, and investing him with a right which makes inquiry certain and speedy, ought to be well understood, in order that the subject matter of complaint be properly limited, and the practice or procedure under it be simple and uniform. Unless the species of wrong be clearly defined, it would be in the power of any dissatisfied soldier to harass his officer with baseless or malicious allegations, and the service with troublesome and expensive investigations; and this the more readily, as the article does not provide a remedy against accusations without foundation, made under its provisions; and, from the nature of the subject, would not admit of restrictions for fear of causing injustice, by intimidation to honest complainants.

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Character of.

The preference given by it to the enlisted soldier, was not only in reference to his individual rights, as connected with the duties of the commanding officer of his troop or company, but has likewise an intimate relation with the essential purposes of discipline;—for it is in the equal distribution of justice, and the confidence of protection, that the sure foundation is laid of good order, and subordination.

To promote good order and discipline.

The interpretation of the similar article for the regulation of the British service is fixed, and has insured a uniform practice in regard to complaints made by enlisted soldiers, for a long period of time.

The regimental court-martial here referred to, is solely for the purpose of doing justice to the complainant, and punishment forms no part of its office, inasmuch as a court of this description

Solely intended to do justice—not to punish.

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Not a court of  
inquiry.

Description of  
wrongs to be  
redressed.

is not of adequate powers or jurisdiction to sit in judgment upon, or try a commissioned officer, being limited, in this respect, by the 67th article of war. In connection with this part of the subject, it is proper to mention in this place, that the court, though called to investigate the facts alleged as a wrong by the complainant, is nevertheless not a court of inquiry, with powers such as are contemplated in the 91st article of war, and this, because courts of inquiry can only be ordered by the president of the United States, or by the commanding officer, duly authorized to appoint courts of inquiry, when demanded by the accused.<sup>1</sup> The regimental court-martial now under consideration, is a body organized for special purposes, and therefore much restricted in the range or scope of its powers, and confined in its investigations to a particular species of wrongs.

These wrongs must arise out of the relative connection of the *commanding officer* of a troop or company, and a soldier belonging to it. They relate principally, if not entirely, to matters of allowances; and have reference to clothing, pay, messing, repairs, and all things belonging to what is understood as the interior economy of a company;<sup>2</sup> that is, they have reference to matters of account between the captain, or commander of the company, and the soldier.<sup>3</sup> This is the description of the wrongs contemplated by the article, and therefore accusations by a complainant, impugning the character of an officer, would be foreign to the view of the ar-

<sup>1</sup> 92nd Article of War.

<sup>2</sup> Simmons, p. 73.

<sup>3</sup> Macomb's Practice of Courts-Martial, p. 90.

ticle ; or injuries growing out of the acts of other persons, not so related (that is, commanding officer of a company and soldier belonging to it,) could not be considered by this regimental court-martial, but would necessarily be prosecuted by the usual means, afforded for the administration of justice to the army.<sup>1</sup>

In the case of Arthur C. Delap, a private of company A, 8th regiment of infantry, upon complaint preferred by him against Surgeon Lyman Foote, the court of inquiry assembled to investigate it, entered at some length into an examination of the 35th article of war, (see general orders, No. 13, dated "war department, adjutant general's office, Washington, February 20, 1843,") and stated in the opinion expressed, an interpretation of the same.

Case of Private  
Delap.

The views expressed by the court of inquiry, embody substantially those here given, and particularly as to the matter of complaint, it is said :—"The American law on this whole subject is believed to be the same as the British law, with the single exception that the complaint, under the British law, can only be made against the complainant's captain, or other officer commanding his troop or company." Now all the writers on English military law, who speak at all of this subject, agree in confining the complaint to matters arising out of the commanding officer's *administration* of the interior economy of the company, and it is in reference to this restriction that the court of inquiry remark, "that to 'do justice to a complainant,' and to sustain the majesty of a violated law, are two very

<sup>1</sup> Samuel's Law Military, p. 504.



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Opinion of the  
court of inquiry.

different things. In the one case, a wrong may be remedied to the entire satisfaction of the complainant,—as in matters of account an error may be corrected. But in the other case, such as the infliction of a personal injury upon the complainant, justice cannot be done to him, and if the aggressor be a commissioned officer, resort should be had to a tribunal competent to inflict a penalty upon him for a violation of law. In such cases, the complainant must be regarded not as seeking ‘justice to him’ in the meaning of the 35th article of war, but as seeking justice upon his aggressor. It is, therefore, the opinion of this court, that the regimental court-martial, provided for in the 35th article of war, was designed to act upon such cases as admit of ‘doing justice to the complainant,’ in the language of the law, and never was designed to bring under examination, complaints amounting to an ‘accusation or imputation’ of an officer, (see 91st article of war,) an inquiry into which, so liable to abuse, can only be had under the provisions of the 92nd article of war, or by a general court-martial ordered by competent authority.”

Exception to the  
opinion of court  
of inquiry.

In the interpretation of the 35th article of war, by the court of inquiry referred to, the author has great pleasure to acknowledge a general propriety of thought, and therefore fully acquiesces therein, with the single exception of considering *every* officer of the company as obnoxious to complaints on the part of any soldier belonging to it. They say, “It is the opinion of the court, that the officers referred to in this article are company officers—of the company to

which the complainant belongs—and to no other officers.”

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The basis upon which this last conclusion is founded, seems to be altogether in the fact that the law of congress of 1806, omitted the words, “commanding the troop or company to which he belongs,” and such fact is clearly set forth in the argument of the court. By the adoption of the same views as those prevailing in the British army, and by which the subject matter of complaint is limited to wrongs connected with allowances of pay, clothing, messing, &c., &c., it appears that the court of inquiry did not perceive that by making the article applicable to any officer of the company to which the complainant belongs, there was a manifest inconsistency in the diverging parts of their opinion. If indeed, the variance in the article of 1806, was intended to make officers, other than the commander of the company, subject to complaints by soldiers, and to cause them to be investigated by the regimental court-martial authorized under its provisions, why did not the court of inquiry embrace every officer of the regiment, instead of confining it to those of the company to which the complainant belongs only? The same authority which appoints the court for the examination of complaints against the latter, would be equally competent to appoint courts for the same purpose in regard to the former; and no more delay, expense, or inconvenience to the service, would be experienced in the one case than in the latter. If the 35th article of war had no existence, there would be ample means for the redressing of wrongs, in which punishment

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of the oppressor was the aim of the complaint. But that article had an entirely different purpose—a purpose which was solely for the settlement of errors, or wrongs, growing out of the *administrative* part of the company command—something in the nature of a board of arbitration, by which facts were to be ascertained, and thereby justice done. Now, as an officer of the company, not the commander thereof, cannot stand in such relation with the soldiers composing it, it is certain that he can never be held accountable in the mode contemplated by the 35th article of war, and therefore, it appears, that the opinion of the court of inquiry, respecting the particular matter to be complained of, and the persons against whom such complaints will lie, is clearly contradictory. “The wrong is either subsisting or foregone, and of such a nature as is capable of redress,” for the article “aims not further than the doing justice to the complainant.”<sup>1</sup> It consequently would seem a necessity, independent of the difference of phraseology in our law, that the like interpretation throughout should prevail, as that now accepted in the British army. For if the latitude allowed by the opinion of the court of inquiry is admitted, we must consider the enactment referred to, as supererogatory, or bring it in conflict with the provisions of the 67th and 92nd articles of war. It is from such considerations that the author is compelled to differ from the opinion expressed by the court, and to conclude that, *none but the captain, or other officer commanding the troop or company to which the com-*

The commander of the troop or company only subject to complaint under the article.

<sup>1</sup> Samuel's Law Military, p. 505.

*plainant belongs*, can be held subject to complaints, in the manner or form specified.

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Parties to the  
inquiry.

The words of the article, "inferior officer or soldier," include all persons belonging to the troop or company under the rank of commissioned officer, and them only: and the words, (after the word "captain") "or other officer," signify—or other officer commanding the troop or company. Thus the parties to an inquiry under the article are distinctly named and limited. The wrong to be redressed, as has been before stated, must be of such a nature as grows out of the relative connection of the officer commanding the company, with the soldier belonging to it; and have reference to some right of the latter which is improperly restrained, or some abuse committed by the captain, "or other officer," or by him permitted to another: and *military* offences of which the laws and the custom of service take cognizance, would not be a legitimate subject for inquiry by such court, for the "doing justice to the complainant." Such matters must be referred to a superior officer, so that a proper court may be convened for the trial and punishment of the accused.

Soldiers cannot require a regimental court-martial to be assembled, (nor would it be lawful if assembled,) to do them justice for wrongs alleged by them as suffered from officers not the captain, or officer commanding the troop or company to which they belong. These cases must find a remedy in the ordinary proceedings of a general court-martial for the *trial* of the wrong-doer, should the circumstances be thought by

Complaint  
against other  
company officers  
not commanding  
company.

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the commanding general, to call for such a course.

Application to  
be first made to  
the captain.

The individual who is aggrieved must always, in the first place, address himself to his captain, or other officer commanding the company to which he belongs, and then, if redress is denied, he may carry his complaint to the commander of the regiment. This course is consonant with the rule of communications made to superiors, and is therefore required. Samuel, however, in his work on the "Law Military," lays it down as a rule, that the soldier is to make his complaint "without any circuitousness, to the commanding officer of the regiment:"<sup>1</sup> but Captain Simmons, in his treatise on courts-martial,<sup>2</sup> entertains a different opinion; and such too is the custom of our service, for it is evident that very frequently upon having complaints made known to him, the captain or other commander of the company may at once do justice to the complainant, and thus obviate the necessity of any further proceedings. The complaint having been laid by the soldier before the commanding officer of the regiment, the latter has no discretion to exercise, but must forthwith "summon a regimental court-martial for the doing justice to the complainant."

No discretion in  
commander of  
regiment to  
withhold a  
court.

Either party  
may appeal.

If the alleged wrong be substantiated by proper evidence before this regimental court-martial, such decision will be made as shall cause the grievance to be abated or remedied. With such decision, if either party be dissatisfied, an appeal may be made to a general court-martial. The object of an inquiry under the article is to

<sup>1</sup> Samuel, p. 505.

<sup>2</sup> Simmons, 72.

"do justice to the complainant," and not for the purpose of punishment; the court would, therefore, not be justified in law to express an opinion affecting the character of the officer, but must confine itself to the merits of the case, and simply state whether the complaint be well founded or not, and to what extent. If such decision be adverse to the officer, it becomes at once the duty of the commander of the regiment to see that the officer complained of does justice to the complainant. If, however, the latter refuse so to do, and not appeal from the decision to a general court martial, it follows as a matter of course, that the superior authority of a higher court should be invoked, to enforce obedience to the decision of the inferior tribunal, as well as to punish the officer who in such manner had contemned its requirements; otherwise the proceedings in the first instance would be entirely nugatory.

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How the opinion is expressed.

Obedience to the opinion to be enforced.

The second part of the article declares, that, "from which regimental court-martial, either party may, if he thinks himself still aggrieved, appeal to a general court-martial. But if upon a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the said court-martial."

Here it is perceived that either party has an absolute right of appeal, by which justice may be ensured. But to guard against troublesome and vexatious suits urged by a captious or malicious temper, the general court-martial is wisely invested with discretion to punish the appel-

Vexatious and groundless appeals.

Court may punish the appellant.

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To obtain a  
summary rem-  
edy.

lant, whenever the appeal shall appear to be vexatious and groundless.

The object of the article is to afford a summary remedy to inferior officers and soldiers, and the benefit of it would be somewhat doubtful if they could not be sought but at the hazard of punishment. The general court-martial would therefore, considering the provisions of the article as founded upon the principle of succoring the weak against the oppression of the strong, be slow in denouncing a penalty, when the appellant might fail in supporting his accusation; and this, because such failure might be the consequence of ignorance, or inadvertency, in the method of prosecuting the same; and it certainly would amount in a considerable degree to a denial of justice, to encourage in the first instance a free complaint, and then "denounce a heavy punishment as a kind of counterbalance to such encouragement, in the event of a misconceived injury or ill conducted prosecution."

The general  
court-martial to  
act with discre-  
tion and tender-  
ness.

It does not follow that a failure to substantiate the charge, necessarily subjects the appellant to punishment. Such a result would be grossly unjust. The power lodged with the general court-martial to punish must still "be tenderly and discreetly used, and only where there is no probable cause for the appeal,"<sup>1</sup> and where it is evident that it is wholly "VEXATIOUS and GROUNDLESS;" and the court should under any circumstances be cautious in coming to such conclusion; for the very end of the law, and the principle of retributive justice might otherwise be destroyed.

<sup>1</sup> Samuel, p. 509.

As the remedy provided against wrong is a very summary one, it follows that none but direct sufferers can complain or be entitled to it. Informants are positively excluded, no matter from what motive they may act. The complainant must be the suffering party and he alone.

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Direct sufferers only may complain.

It is also a principle that no combination or joining of complaints together, so as to present a formidable whole, can be allowed. Such proceeding on the part of soldiers would be a dangerous innovation upon the principles of the military state, and inconsistent with proper notions of good discipline. The very joining in such complaints would argue a mutinous pre-understanding, which the article is intended to prevent; by affording a sure means of redress for every wrong or injury as it occurs.

Combination of complaints forbidden

For the redress of wrongs as described in the preceding pages, the law has sanctioned an appeal from the decision of the first body called to investigate the grievance complained of. This is the only case, and it is only under such circumstances, in which an appeal can be made. It evinces a particular consideration and jealousy for the rights and satisfaction of inferior officers and soldiers, and has made an exception to the ordinary course of military trials which distinguishes it in a very marked manner. It not only authorizes to some extent a review of the proceedings in the first instance, but secures all the advantages of a new trial (as in fact it really is), independent of any previous examination, and therefore puts the party in a situation, to cure all the inconveniences, inadvertencies, errors,

The only cases in which an appeal is allowed, advantages of.



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Mode of proceeding. Parties not sworn.

and deficiencies of testimony which may have marked the first progress of the complaint, and rendered, very probably, an appeal necessary.

'The mode of proceeding in these cases is as follows :—The regimental court being assembled and the parties present, the order for assembling is read, when the complainant and the defendant are asked if they have any objection to any member, which together with the answer of each are minuted on the record. The court is duly sworn. The complainant then states the grievance complained of, and proceeds to prove the alleged wrong. The officer next adduces whatever he may have in refutation or explanation of the allegation; and both parties and their witnesses having been heard, the court is closed for deliberation, and an opinion is given on the subject before it. All the witnesses must be examined under oath, but neither of the parties can be sworn.

If either the complainant or defendant is dissatisfied with the decision, and thinks himself still aggrieved, he may appeal to a general court-martial, by which the whole subject is again heard.

On an appeal the case is reheard as a new trial.

The appeal here alluded to, is a new trial of the very same circumstances, which were inquired into by the regimental court. But neither the proceedings nor anything that took place on the regimental court can be received as evidence by the general court-martial. Any witnesses whether examined before or not may be called by either party and examined—for being a new trial, the proceedings of the second are entirely irrespective of anything which tran-

spired at the first; and neither before the regimental or the general court-martial, does any person appear as a prisoner. The following is the form of procedure in cases of appeal:—

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The court having assembled, and the appellant and respondent being present, the order for the court is read. Both parties have the right of challenging, and the judge advocate puts the usual question on this point, first to the appellant, and afterwards to the respondent, minuting such, and the respective answers on the proceedings. The members and the judge advocate are duly sworn. The statement of alleged wrongs by the appellant is read and recorded, and that party first addresses the court and lays what he considers his wrongs before it, and exhibits whatever proof he may possess in support of his declarations. The appellant must not in any case be sworn. The witnesses who are called by either party give evidence on oath. When the appellant's case is fully before the court, the respondent is allowed to reply to it, by offering such evidence as he thinks necessary; but the respondent himself should not be sworn unless required to be so by the appellant, or when the court deem it necessary, that he may depose to *facts*. The subject having been thus developed, the court deliberates on the evidence and gives its opinion thereon.

Proceedings on  
an appeal.

This opinion consists in the simple declaration, that the appellant either has substantiated, or failed to substantiate the grievances complained of.

Opinion of the  
court.

And should the court be further of opinion that the appeal is vexatious and groundless, such

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fact would be stated, and the court would then proceed to pass such judgment upon the appellant, as the circumstances of the trial would warrant.

The meaning of the law, or 35th article, is undoubtedly such as is set forth above, and is confirmed by the similar interpretation and practice under it of the British service, from whence it was derived. The particular subjects for investigation are limited, according to the rule laid down, and made certain by the comparison with it of other articles of war which provide for the trial and punishment of all persons accused and convicted of military crimes. It is somewhat singular, considering the clear intention of the article, that such a misapprehension of it should have existed for a long period, and that so clever an author as Major Adye should have aided by his remarks, under the head of "Courts of Inquiry" (page 77), to continue the error. It is there observed—"And courts of inquiry might, I should think, be also made use of for searching into the foundation of complaints of inferior officers or soldiers, who may think themselves wronged by their captains or other officers, for which commanding officers of regiments are required by the articles of war, to summon regimental courts-martial, in order to do justice to the complainant. For as no commissioned officer can be cashiered or dismissed from the service, except by order from the king, or by sentence of a general court-martial, if the complaint is found to be just, and of so heinous a nature, that the offender appears to deserve cashiering, this regimental court-martial has not power to inflict the

Remarks on the  
35th article of  
war.

punishment adequate to the crime ; where then is the use of summoning a court which cannot do justice to the complainant ? Were the circumstances of the complaint to be previously examined by a court of inquiry, a judgment might be formed from their opinion, whether there was a sufficiency of matter to bring the offender to trial, and a too frequent and unnecessary assembling of courts-martial be thereby prevented."

It is evident from the above quotation, that Major Adye was mistaken in his view of this particular article of war, and that he confounded its provisions and purposes with the ordinary powers of other courts-martial to try and punish.

## CHAPTER XIII.

### COURTS OF INQUIRY.

#### CHAPTER XIII.

Origin of courts  
of inquiry.

COURTS of inquiry in the armies of Europe, it would seem derived their origin from the prerogative of the sovereign, and became part of the military judicature by custom and not by express law. From this fact it has been considered, that the exercise of this authority, instead of being regarded as an assumption of power, is a favor to the accused, and it is thus stated by Captain Simmons in his work on courts-martial at page 84:—

“As it is the prerogative of the crown to dismiss officers from the service without affording them any public opportunity of justifying their conduct, it must undoubtedly in some sense, be considered a work of royal favor, that an officer should have extended to him such opportunity, as a court of inquiry may yield, of exculpating himself from the charges brought against him, and of regaining the royal confidence.”

Courts of inquiry  
authorized  
by law.

But for the army of the United States, courts of inquiry have been specially authorized by legal enactment, and the 91st and the 92nd articles of war embody all the provisions in relation thereto.

Who may order  
courts of in-  
quiry.

The origin and purposes of such courts, would naturally lead to the conclusion that they are of the essence of high command; and therefore the

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right to convoke them, under all the legal restrictions, is properly confined to the President of the United States, a general commanding an army, or a colonel commanding a department; and in the cases of enlisted men, the commanding officer of the regiment. It has indeed been claimed, that the right exists in the commander of a "fort, garrison, or barrack," &c., "where the troops consist of different corps," but this is thought to be an erroneous opinion, and if admitted, would extend the privilege beyond the proper bounds, and encroach upon the spirit of the prohibition, so jealously declared in the last clause of the 92nd article of war.

Courts of inquiry, being invested with power to examine witnesses on oath, partake necessarily, to a certain degree, of the character of a judicial body; and their proceedings are consequently marked by great precision; though as regards documentary evidence the same strictness is not always observed, as would be required by courts-martial having power to try and sentence.

Examine witnesses on oath.

In the treatise on "the practice of courts-martial," by Major Hough,<sup>1</sup> the author considers the examination of the witnesses on oath, as precluding a trial subsequently; for says he,—“if the witness were examined on oath and a general court-martial was afterwards assembled, it would amount to a second trial.” This opinion is not acknowledged as just, and would conflict not only with the objects contemplated by an investigation by a court of inquiry, but with the restraints which were purposely introduced into

Investigation by court of inquiry preliminary to trial.

<sup>1</sup> Page 26.

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the law for the special protection of the accused party. The fact that "the parties accused shall also be permitted to cross-examine and interrogate the witnesses," gives to the proceedings of these courts much of the appearance of a trial. But it must be recollected, that such cross-examination of the witnesses, is for the purpose of explanation only, not to enable the court to pass judgment, but to ascertain facts. A trial is where a body having jurisdiction and powers, investigates, and passes judgment: by it therefore the crime is not alone measured and declared, but the criminal punished. An inquiry, on the contrary, while it investigates or examines the circumstances of the accusation or the imputation alleged, does not stigmatize the party by a declaration of guilt, but simply reports facts, and when required, an "opinion on the merits of the case," which ought to express only, the propriety or expediency, or otherwise, of further military proceedings in the case:—For "when facts attaching to the conduct of individuals, are submitted to the investigation of courts of inquiry, with a view to ascertain the expediency of a court-martial, it would seem to accord with ordinary conceptions, as to justice, that the opinion, if any be required, should be confined to that particular point; especially if it express the necessity of trial, since the information may be *ex parte*, and must from its nature be inconclusive."<sup>1</sup> And, "the court should not pronounce any opinion as to the guilt of the accused, because according to the spirit of the English law every one is presumed to be *innocent*, till the con-

Opinion as to  
further military  
proceedings.

Does not pro-  
nounce an opin-  
ion of guilt.

<sup>1</sup> Simmons, p. 81.

*trary* is established by the oaths of competent and credible witnesses. The giving an opinion in the above qualified manner may assist the commander in chief, and can in no way prejudice the accused, because the opinion ought not to be made public, and the members of the court are precluded from sitting as members on the general court martial if it should be assembled, the necessity of which the commander in chief is to judge of."<sup>1</sup>

As it always has been thought that the discretionary power to summon courts of inquiry would prove dangerous to professional character, or military merit, the law has restricted the convening of such courts, unless ordered by the president, or demanded by the accused. This court has the same power to summon witnesses, as a court-martial, which now (unwisely) can exert no compulsory authority except in the case of military persons.

From the nature of the proceedings, it does not seem obligatory upon the accused to take any part in the inquiry, though he cannot refuse to obey an order, directing him to appear before the court.

The accused, nevertheless, has a positive right to be present at an investigation should he so prefer, and this is evident from that clause in the ninety-first article, which gives to him the right "to cross-examine and interrogate the witness." The accused however can hardly fail to be benefitted by his attendance, as he may avail himself of the opportunity to explain any transaction from which an imputation prejudicial

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## XIII.

The appointment of courts of inquiry restricted

Powers of court of inquiry to summon witnesses.

Accused party need take no part in proceedings.

Right of the accused to be present.

Advantage of attendance.

<sup>1</sup> Hough's Mil. Law Authorities, p. 28.



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to him may have arisen. By attendance he is also made acquainted with the substance and nature of the evidence to be brought against him in case of ulterior proceedings; and also enabled to perceive any material discrepancies which might exist, between the evidence of any witness, before the court of inquiry and the court-martial.

Accused not bound to answer to what may criminate himself.

As it is a principle well understood in the jurisprudence of the land, that no person can be called upon to criminate himself; it is therefore settled, that the accused cannot be required to answer any questions which may tend to such result.

Counsel allowed.

The parties before a court of inquiry, that is, both the accuser and defendant, may be allowed counsel, or friends to be present; and this because the principal object is to ascertain, by the examination of witnesses on both sides, whether there is ground for a trial; and the presence of such persons may be useful by inducing the accused to afford explanations.

Courts of inquiry may be open or closed.

Courts of inquiry may be either open or closed, depending upon the nature of the transactions to be investigated. The court decide this question of procedure, or it is ordered by the authority convoking the court. The propriety of this discretion is evident, as there may be matter before the court of too delicate a nature to be made public, or questions pertaining to public interests which might be prejudiced by such publicity. It is in most cases of complaint usual to allow the court to be an open one.<sup>1</sup>

•The duties and powers of a court of inquiry,

<sup>1</sup> Hough's Mil. Law Authorities, p. 2.

are defined to be, "to examine into the nature of any transaction, accusation, or imputation, against any officer or soldier," and to give an opinion on "the merits of the case, when they shall be thereto specially required;"—and not otherwise. Thus the purposes of such courts are clearly declared, and abuses, by assigning to them other duties which may affect the standing of an officer or soldier, guarded against.

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Duties and  
powers.

The particular attention of the court is called to certain parts of the matter to be inquired into, by the authority ordering the court to assemble, whenever such may be thought advisable; and the order will always state whether the court is to report the facts, and likewise whether an opinion on the merits is required. The court should be well instructed as to the extent of the investigation, that is, whether it is to be general, or whether particular points only are to be examined into; and the court is strictly to limit its proceedings, and the extent of its inquiry, by the order convening it, or by instructions emanating from the same source.

Instructions  
given by the  
authority which  
appoints the  
court.

Court to limit  
its proceedings.

It is evident, from the restrictions which the law has imposed upon courts of inquiry, that such courts are to confine themselves in their examination, to the particular subject or subjects laid before them; to depart therefrom, would be to transcend their authority.<sup>1</sup>

Not to depart  
from the partic-  
ular subject of  
investigation.

When the court is required to report the *facts* of the case, it is not considered as complying with the order to submit the record and testi-

Facts are not  
reported by sub-  
mitting the re-  
cord; special  
statement must  
be made.

<sup>1</sup> Should a court of inquiry fall below the number indicated in the order convening it, the court could not continue proceedings without authority so to do from the same, or competent authority.

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mony. By the *facts* to be reported, it is understood, the result or conclusion of the court, from the hearing of the evidence, and therefore to be distinctly set forth, as the court believe to be correct or true.

Member may be  
challenged.

It seems to be a settled principle now, that a member of a court of inquiry may be challenged for cause by either party. A precedent of this kind is to be found in the proceedings of the court of inquiry, in the case of Brevet Major General Gaines, held at Frederick, Maryland, January 7th, 1837.

The reasons for the establishment of such a right are obvious. Courts of inquiry, in our service, are sworn, as well as the witnesses who are called for examination. The parties have the right of cross-interrogation, and the whole proceedings, with the exception of the power of the court to decide, partake much of the character of a trial; and when an opinion on the merits of the case is required to be given by the court, it is of essential interest, that such opinion should be the result of candid investigation and unprejudiced feeling. An opinion, though not decisive of the question of guilt or innocence, is nevertheless operative upon public opinion, or individual sentiment, and therefore may as surely tend to the hurt of the defendant, as an unjust or prejudiced decision by a court-martial. If any doubt should exist, however, as to the propriety of exercising this right, the right itself should not be gainsayed, when it is remembered that the indulgence of it is always subject to the discretion of the court, and can never be detrimental to a just inquiry.

The hours of sitting are not limited for courts of inquiry. The restriction imposed by the 75th article of war, that no "proceedings or trials be carried on, excepting between the hours of eight in the morning, and three in the afternoon," is only applicable to courts-martial.

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Hours of sitting  
not limited.

The accused cannot demand a copy of the documents recorded in the proceedings, as the inquiry is a preliminary to trial only, and the evidence, of whatever nature, is intended for the authority ordering the court. Nor is there any legal right to demand a copy of the proceedings. It is only in the case of a *trial*, by a *general* court-martial, that the party tried, upon demand made by himself, or by another person or persons in his behalf, is entitled to a copy of the sentence and proceedings of such court-martial.<sup>1</sup>

Accused cannot  
demand copy of  
documents, nor  
of the proceed-  
ings.

Contempts before courts of inquiry, are as much punishable as though they were committed before courts-martial. Officers may be placed in arrest, and soldiers may be confined by order of the court.

Contempts pun-  
ishable.

The accused officer before a court of inquiry, is not under arrest unless there exists some necessity for it.

The proceedings of a court of inquiry, are authenticated by the signatures of the recorder or judge advocate, and the president; and they may be admitted as evidence by a court-martial, in cases not capital, or extending to the dismissal of an officer; *provided*, that the circumstances are such, that oral testimony cannot be obtained. The proceedings may be revised, and as the opinions of such courts are not expressive

Proceedings au-  
thenticated—  
when admissi-  
ble as evidence.

Proceedings  
may be revised.

<sup>1</sup> 90th Article of War.

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of the guilt or innocence of the accused party, they may be revised more than once. In this respect, it appears there is a difference between them and the proceedings of a court-martial. (see chap. 10.)<sup>1</sup>

Charges for investigation to be submitted in writing.

Charges, or a statement in writing, or documents are submitted to the court, which are to be investigated; and the instructions which are given for the court's guidance, are not to be deviated from.

Interpreter.

If it should be required, an interpreter is appointed.

Not sworn to secrecy, but are to observe it.

Courts of inquiry, it will be seen by reference to the oath, prescribed in the 93d article of war, are not bound to secrecy as to either individual votes, or the general opinion; still, there is a general propriety that no member shall disclose such, because the expression of opinion might prejudice the accused party, in case of a trial by court-martial. Where the authority ordering the court of inquiry, deems the proceedings of such a nature as to preclude a further investigation, it would certainly be a breach of decorum, or of military discipline, on the part of a member of a court of inquiry, to disclose or publish the opinions of the members, or the opinion of the court, without the sanction of the superior officer to whom the whole proceedings had been submitted.

In the work compiled by the late Major Gen-

<sup>1</sup> There is no restriction by law against reviewing the proceedings of a court-martial more than once. The principle however which makes such procedure objectionable is so obvious, that it is generally considered as improper, or repugnant to justice. In the British service there is a special provision of law which forbids it.

eral Alexander Macomb, entitled "The Practice of Courts-martial," it is laid down as a principle, (page 94,) that "transactions may become the subject of investigation by courts of inquiry after a lapse of any number of years, on the application of the party accused, or by order of the president of the United States; the limitation mentioned in the 88th article of war, being applicable only to general courts-martial."

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The doctrine here stated, is one to which the author cannot fully accede,—the more particularly, as it conflicts with the opinion in a previous chapter, respecting the right of the president to dismiss a commissioned officer from the service without trial. The opinion contained in the last mentioned work, seems to have for its basis, the rule and principles adopted and understood, for the regulation, in that particular, of the British army. It has been before stated, that the origin of courts of inquiry is derived from custom, and that in England it is considered as an inherent right of the crown to appoint courts of inquiry,<sup>1</sup> but that with us it is explicitly the creation of law. As it is the prerogative of the crown to dismiss officers from the service without a hearing, it may truly be viewed as a favor, whenever a court of inquiry is appointed, by which an accused person may have an opportunity of justifying himself. Under our government, where such prerogative or power is questionable to the chief magistrate, and an act which specially confers the authority to appoint

Time limited  
for the investi-  
gation of offen-  
ces, by courts  
of inquiry.

<sup>1</sup> Hough, p. 436. See also case of "Home vs. Lord Bentick," for a libel.

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such courts of inquiry, the same argument cannot apply.

By the 88th article of war it is declared, that "no person shall be liable to be tried and punished by a general court-martial, for any offence which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period."<sup>1</sup>

Purposes of  
statutes of limitation.

Now what are the grounds upon which all statutes of limitation are founded, but for the sole purpose of preventing vexatious and continued litigation, or malicious prosecutions; and that too at the manifest hazard of great injustice to defendants, when, from the lapse of time, the true and necessary testimony may be lost or weakened, by the decay of memory or the death or absence of witnesses. And shall not this shield, under every and all circumstances, be extended to military persons, where, from the very nature of their employment, and the transactions in which they are actors, evidence is much more likely to be dispersed or lost, and subject to greater chances of doubt, than in the ordinary walks of civil life? And yet, under the vicissitudes of a camp life, some would contend, that after the lapse of any number of years, an inquiry into the conduct of any person may be instituted, by which reputation may be endangered, and such a question determined by any chance evidence which may be gathered,—and

<sup>1</sup> As there is no act of limitation for the navy, the same legal objection does not therefore apply to the service.

with such marks of dubiety impressed thereon, as would make a court-martial reject it as insufficient. Would not, therefore, the assumption of such power be most oppressive? The true purpose to be attained by a court of inquiry, is to ascertain whether there be grounds for convening a court-martial to investigate the charges, or not; and such a pretext cannot possibly exist, where the facts charged have arisen at a period beyond the retrospection of a court-martial.

Such too is the view of the subject taken by one of the most able and approved writers on the constitution and practice of courts-martial in the British army;<sup>1</sup> in which he acquiesces in the doctrine, as far as it concerns the prerogative of the sovereign, but expressly opposes the assumption of such power by any authority subordinate to the crown. "Nor can he (the accused) under any circumstances, after the time limited for a court-martial, by the mutiny act, obtain a hearing of his case by any tribunal competent to decide on it. Surely then, justice forbids investigation by a court of inquiry, which may countenance malicious accusations, or give rise to, and ferment prejudices, which it cannot allay, and of which it cannot pave the way for trial; and particularly as the members who compose the court—are so limited in number and irresponsible to any superior tribunal for the opinion they may give."<sup>2</sup>

<sup>1</sup> Simmons.

<sup>2</sup> Ibid., p. 85.



## CHAPTER XIV.

### OF THE CHARGES.

<b>CHAPTER XIV.</b>	<b>"It is a general rule that no person shall be excused from punishment for disobedience to the laws of the country, unless he be expressly defined, and exempted by the laws themselves."<sup>1</sup> and—</b>
<b>General rule.</b>	
<b>Written statement of the crime required.</b>	<b>"Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions."<sup>2</sup></b> <b>The eightieth (80th) article of war has made provision for a written account of the crime with which any prisoner is charged; and it is therefore a matter of importance that the principles upon which the declaration of offences are founded should be well understood. The propriety or necessity of having established rules for our guidance in these matters, is obvious upon the slightest reflection; and the privileges and protection which the constitution and law extend to every citizen might otherwise, by a loose or vague method, be denied or annulled.<sup>3</sup> The public interest, therefore, connected with the military service, as well as the particular rights and safety of individuals are involved in the manner in which charges are preferred, and trials before military tribunals of justice con-</b>

<sup>1</sup> 4 Black. Com., 20.

<sup>2</sup> Archbold's Crim. Plead.

<sup>3</sup> 5th Amendment, and 87th Article of War.

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ducted. Precision in the prosecution of crimes; regularity in procedure; and certainty of punishment, are materially dependent upon these rules; and economy of time and money follows as a consequence of their observance. In the remarks offered upon this subject, it is only intended to notice the most prominent points, which present themselves for consideration, and which are deemed sufficient to lead the reader to a just understanding and appreciation of the principles embraced therein. To attempt a full and minute exposition of this branch of our subject would evidently require too great a space for the proposed limits of this treatise. A brief statement therefore is all that will be attempted, and indeed it may be said, all that is really to be desired in a work of this description. While precision and conciseness are requisite to be observed in framing charges of military offences, it is nevertheless unnecessary that the technical strictness used in an indictment should be followed. The minutiae of the ordinary courts of law would swell the proceedings of military courts to an inconvenient extent, were they followed in the charges or pleadings of the latter, and with no material benefit to their ultimate decisions. Yet there are certain points which require exactness in the one as in the other court, and it is to these particular parts that our observations are intended to apply.

Technical niceties unnecessary in military charges.

It has been observed, "that the strictness required in indictments was grown to be a blemish and inconvenience in the law and the administration thereof; that more offenders escape by

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the over-easy ear given to exceptions to indictments, than by the manifestation of their innocence, and that the grossest crimes had gone unpunished by reason of these unseemly niceties."<sup>1</sup>

Absence of regular and consistent rules an evil.

If the subtle distinctions thus observed in the administration of criminal justice by the ordinary law courts, have been productive of the evil noticed in the above passage, it is to be feared that the want of a regular and consistent rule for the guidance of courts-martial, has led to consequences frequently of a very different character; and it may be said, perhaps, that the want of some nicety in the statement of the charge has at times led to the punishment of an innocent person, or at least to judgment for a crime, which the facts alleged did not constitute. To avoid the over nicety of the first, and the vagueness of the latter practice, is the necessary rule to be attained.

Definition of a military charge or accusation.

A military charge is, in the nature of an indictment, a written accusation against any person or persons, subject to military control. It is a plain, brief, and certain narrative of the offences committed, and of those necessary circumstances that concur to ascertain the fact, and its nature,<sup>2</sup> and a charge of this character will lie against all military persons, (under the rules and articles of war,) who actually commit crimes against the military laws, the regulations for the service, or orders, and the custom of war, &c., &c.

Certainty of legal terms in a charge.

Now with what certainty of legal terms and language should a charge be framed? It has been already remarked, that military offences or

<sup>1</sup> Lord Hale.

<sup>2</sup> Ibid.

crimes do not require to be set forth with technical strictness and nicety; if such were the practice it would much encumber the proceedings of military courts, without any substantial benefits, and make necessary a body of legal men, or lawyers, for the guidance and administration of military justice. But although this technical nicety is not required, still in every charge there should be such precision and certainty, in "the description of the offence, that the defendant may know what crime it is which he is called upon to answer; that the court may appear to be warranted in their conclusions of guilty, or not guilty, upon the premises delivered to them, and that they may see such a definite crime, that they may apply the punishment which the law prescribes. This is what is meant by the different degrees of certainty mentioned in the books; and it consists of two parts—the *matter* to be charged, and the *manner* of charging it. As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed, must be set out. Where the crime is a crime independently of such circumstances, they may aggravate, but do not contribute to make the offence."<sup>1</sup>

The charge therefore must be—

1. *Strict and positive*.—It must not be stated argumentatively, but be alleged in express and positive language; and it is particularly essential that it be not repugnant or inconsistent with itself, for the law will not admit of absurdity and contradiction in legal proceedings.<sup>2</sup>

2. *Certain as to the party accused*.—The de-

Requirements  
of a charge.  
Strict and positive,  
not repugnant to itself.

<sup>1</sup> King v. Horne, Cowp. 672.

<sup>2</sup> Chitty's Crim. Law, p. 230.

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Certainty as to  
the person ac-  
cused.

fendant must be described by his title or rank, christian name, and surname, and the addition of the company, regiment, or corps, to which he belongs. The difficulties which, in civil courts of criminal jurisdiction, sometimes arise from ignorance of the name of a party, can hardly ever happen in military life, and therefore the danger of a misnomer does not occur.

Certainty as to  
time and place.

3. *Certain as to time and place.*—If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated, and the same as to place. By time making an ingredient of the offence, is understood when the same circumstances or conduct would, on one occasion, constitute a particular crime, though at another it would be different in its character. Thus an officer charged with being drunk on duty, under the 45th article of war, it would be necessary to set forth the nature of the duty, and the precise day, or so nearly, that the time should not be confounded in the testimony, and thus lead the court to adjudge him guilty of a crime, the penalty for which is arbitrarily fixed by the law. The crime here alluded to, is made a specific offence; and in order to bring an offender within its sanction, it must be strictly stated according to the language of the article.

The practice of courts-martial has permitted a wide latitude as to the time specified in the charge. In some cases there has, doubtless, been much error committed therein. The limit of time, within which the commission of any act alleged as an offence may be laid, is much more extended by the indulgence of courts-martial, than is permitted by the ordinary courts of

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criminal jurisdiction. This is an imperfection in military charges which should be cured. Tytler, in his "Essay on Military Law," says that "the prosecutor is allowed some latitude with respect to time, and provided the charge is in other respects sufficiently precise, he may charge the fact or facts to have been committed on such a day, of such a month, or on one or other of the days of that month, or of the month immediately following. But as this is an indulgence granted only from necessity, so in no case where it is possible for the prosecutor to mark the time with certainty and precision, ought he be allowed such latitude as that above mentioned, as it deprives the prisoner of all opportunity of proving an *alibi*."

It is generally laid down by military writers, that the same minuteness and precision ought to be observed in specifying the time and place, as is required for the statement or description of the offence. As to the circumstance of *place*, it is always possible for the prosecutor to be pointed and exact, and therefore should not be dispensed with in the framing of the charge. If a doubt be entertained as to the precise time, it may be set forth, as "on or about such a day," but embracing a reasonable space of time only; and where the time enters into, and forms an ingredient of the offence, the court should be careful that the period included in the declaration be not such as to cause any difficulty, by the evidence, of ascertaining the true time.

In the case of Captain Eustace Trenor, who was accused by the charge 2nd, of *drunkenness on duty*:

Case of Captain  
Eustace Trenor.

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*Specification.*—"In this that the said Captain Eustace Trenor, of the 1st regiment of dragoons, when on duty as officer of the day at Fort Leavenworth, between the 1st day of September and the 31st day of December, 1840, was drunk."

On being arraigned he pleaded as follows:—

Captain Trenor "declines pleading to the 2nd charge and its specification, inasmuch as it includes such a length of time as to prevent the possibility of either disproving it, or defending himself against it; and he therefore hopes the court will not entertain it."

The objections of the accused were sustained by the court, and the 2nd charge and its specification, were accordingly thrown out.

This decision of the court was undoubtedly founded upon good and substantial grounds.

The fact of detail and duty as officer of the day, at every military station, is a matter of record, and easily to be referred to in the guard-reports, and the files of the adjutant's office; it therefore was in the power of the accuser to have stated the time more accurately. By the 214th par. general regulations for the army, it is said, "it is highly improper to hold charges against an officer or soldier, in order that they may accumulate;" and in this case, if any witness had sworn that the prisoner was drunk when on duty as officer of the day, between the days indicated, it would have been simply as his belief, according to memory, and the prisoner could not have disproved the allegation, by showing the particular day or days when he was on duty as officer of the day. This appears more clearly when it is stated that the trial did not

take place until the month of December, 1841, more than a year from the time of the alleged offence.

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Although there is no military crime, to ensure conviction of which it is essential that the precise day should be set forth and proved, yet it is essential, for a conviction in some cases, that the time should be so nearly declared, that if found, it may not appear to be a different day from the one in which the offence could have been committed. That is, the allegation of time should be so well ascertained, as that the alternate words, (usually employed,) "on or about the said time," should leave no doubt of their truth.

The precise day not required to be stated.

The rules relating to the averment of time, apply, for the most part, to the averment of place, and where the time must be repeated upon the allegation of subsequent acts, the repetition of place is generally also necessary.<sup>1</sup>

Rule for the averment of place.

The averment of time, in military charges, may be considered partly substantial and partly formal. Substantial, since it determines the offence to have been committed within the jurisdiction of the court which inquires into it, and formal, since it is unnecessary to prove the act to have been committed at the precise time alleged, unless time itself be material to constitute the offence. It is, nevertheless, a general rule, that the time and place of every material fact, must be plainly and consistently alleged.<sup>2</sup>

It will readily be perceived that the essential of a charge in these particulars, is, that the offence should be clearly distinguished, so that the

Essential requirement of a charge.

<sup>1</sup> Starkie's Crim. Plead., p. 61.

<sup>2</sup> Ibid.



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prisoner may have every means of defence, at the trial, which the law allows, and that at any subsequent period he may be protected against a second trial, or punishment, for the same crime.

Certainty as to the person against whom the offence was committed.

4. *Certain as to the person against whom the offence was committed.*—There are certain offences against military discipline, which may be committed by the abuse of the property or persons of individuals. Of such class is the violation of the law and regulations of the service relative to the flogging of soldiers; and of the particular offences mentioned in the 32nd and the 33d articles of war. In all such, or similar cases, where the crime has been committed against person or property, the name of the injured party must be stated at large, if the name be known. If at the trial, it appear that the party injured is misnamed, the variance is fatal, and the prisoner must be acquitted. Should, however, the name of the injured party be unknown to the prosecutor, he may be described in the charge as a person unknown.<sup>1</sup>

Certainty as to, facts, circumstances and intent.

5. *It must be certain as to the facts, circumstances and intent constituting the offence.*—That is, as every crime or offence consists of certain acts done, or omitted, under certain circumstances, it is not sufficient that the defendant be charged generally with having committed it, but the facts and circumstances must be specifically set forth; and the offence must appear on the face of the charge as a distinct substantial offence. A man cannot be charged with being an habitual violator of orders, or a common

<sup>1</sup> Archbold's Crim. Plead., p. 33.

thief; but the charge must set forth every fact and circumstance which is necessary to make up the offence. In the ordinary courts of law there are exceptions to this principle, growing out of necessity. As, for instance, a man may be indicted for being a common barrator, without detailing the particulars of the barratry;—or a woman may be indicted as a common scold, without detailing the particulars of her conduct. But this cannot be done in the military courts, because there, particular acts or conduct constitute particular crimes. Under this rule; therefore, an officer could not be charged with being a common liar. There is no military law which recognizes the specific offence of lying, but conduct of that character, according to the attendant circumstances, would necessarily be laid under the eighty-third (83d) or the ninety-ninth (99th) articles of war, as conduct “unbecoming an officer and a gentleman,” or “prejudicial to good order and military discipline.” The particular acts or circumstances then by which the violation, or disregard of truth was evinced by the defendant, must be cited in the charge, and thus be shown in evidence.

Written instruments, where they form a part of the gist of the offence charged, must be set out verbatim; or where part only of the written instrument is included in the offence, that part alone is necessary to be set out; and great care must be taken to set them out correctly. The recital of written instruments, which must be set out verbatim, is usually introduced by the words, “*according to the tenor following:*” or, “*of the tenor following:*” or, “*in the words and*

Written instruments, how set out in a charge.

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*figures following :*" or by words that imply that a correct recital is intended.

Substance of a writing to be set out.

When the substance only is intended to be set out, it should be introduced by the words, "*in substance as follows :*" or "*to the effect following.*" The word *tenor* implies that a correct copy is set out.

Particular words set forth.

Where particular words are the gist of the offence they must be set forth with particularity, or declared to be of the like meaning or purport.

No part of the charge to be in figures.

It is necessary to observe, also, that no part of the charge should be in figures; and, therefore, numbers, dates, &c., must be written in words. The exception to this is where a *fac simile* of a written instrument is to be set out; in which case it will appear in words and figures, as in the original itself.

Of words used with an inclusive or exclusive sense.

With regard to particular words used, it should be borne in mind, that the word *until* is capable of either an inclusive or exclusive sense, and, therefore, when used, had better be stated to mean inclusive or otherwise—as, for example, —from, &c., *until* the 10th of November, 1800, inclusive,—or exclusive. But the words *from* and *unto*, when applied to place, are construed in an exclusive sense;—as *from* Philadelphia *unto* Lancaster, would be held to exclude Lancaster;—so, *to* and *from* the city of Hudson, would exclude Hudson.<sup>1</sup>

Rule for the construction of language.

As to the intent, or certainty of the allegation, it is a rule of construction, and cannot, therefore, add to a sentence words which are not *impliedly* included in it. The meaning of the language employed will be fairly construed, according to

<sup>1</sup> Starkie's Crim. Plead., p. 56. 61.

the ordinary and usual acceptation of the words employed, and technical terms according to their technical meaning; and if ambiguous words be used, the sense of the same shall be interpreted in accordance with the context and subject matter, so that the whole shall be consistent and sensible.

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The importance of using technical terms in law proceedings, is derived from the fixed value and weight of such terms, that successive decisions have determined. If doubt should arise as to their meaning, reference may be had to authorities for the meaning, whilst every new expression would introduce fresh uncertainty, and the benefits to be derived from precedents be wholly lost. But few terms of art, comparatively, are necessary to describe offences, in military charges, and, therefore, there ought not to be any difficulty in setting forth such offences with clearness and precision.

Utility of technical terms.

The intention of the party, at the time he committed the offence, is often a necessary ingredient of it; and, therefore, as necessary to be stated in the charge as any other facts or circumstances which constitute the offence. This feature of the accusation, has been very frequently disregarded in the statement of military charges. Most generally the bare commission of the act has been declared, leaving the criminality of it to be decided by the court, as an inference of intention, by the evidence adduced. It is preferable, however, that the intention, when necessary to make the acts alleged amount to a crime, should be averred; and this the more particularly, because it involves no specialties

Intention at the time of committing the offence.

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which might confuse, but rather aids the court in the understanding of the matter submitted for investigation.

Where the law has adopted certain expressions to express the intention.

In some cases the law has adopted certain expressions to show the intention with which an offence is committed; and in such cases the intention must be expressed by the technical word prescribed, and no other:—thus, for instance, the fifteenth (15th) article of war says, “Every officer who shall knowingly make a false muster of man or horse; and every officer or commissary of musters who shall willingly sign, direct, or allow the signing, &c., &c., shall, &c., be cashiered.” Thus, a charge exhibited against an officer for making a false muster, must be laid to have been done “*knowingly*,” and for signing a false muster roll, to have been done “*willingly*.” The words “*mutiny*” and “*sedition*” are technical terms, purely, when applied to military offences, and can only be used and understood according to the fixed acceptance of them, determined by legal precedents, and the custom of war.

Higher or greater criminality of certain acts under particular circumstances.

There are some acts to which the law affixes a higher degree of punishment, when committed under particular circumstances. In all such cases, in order to bring the offender within that higher degree of punishment, it must be expressly charged to have been committed under those circumstances, and the circumstances must be stated with certainty and precision. The 9th article of war provides, that “any officer or soldier who shall strike his superior officer, or draw or lift up any weapon, or offer any violence against him, being in the execution of his office,

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on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, &c. &c.;" therefore, it is necessary to state under this article, that the officer against whom violence was offered, was "*in the execution of his office.*" As to the crime of disobedience of orders, where the command is not manifestly in opposition to law, it is always presumed to be lawful until shown to the contrary: and this, as the offence is one of an aggravated nature, and tending to the greatest evil, and fearful consequences in military affairs. He who takes or assumes the risk of disobedience, must also bear the onus of the proof of justification. In a charge, accusing a commissioned officer, or soldier, with drunkenness, under the 45th article of war, it must be expressly laid as being *drunk on duty*, and the particular duty be also distinctly set forth.

There is also another point to be observed. There are certain offences created by statute, and defined therein: and the offence consists of the commission or omission of certain acts, under certain circumstances, and in some cases with a particular intent. Now a charge under such a law, must clearly declare the accused to have committed or omitted the acts, under the circumstances, and with the intention mentioned in the statute: and if any of these ingredients in the offence be wanting, the charge will be insufficient. Thus, by the 52d article of war, "any officer or soldier, &c.—or who shall quit his post or colors, to plunder and pillage, every such offender, being duly convicted thereof, shall suffer death, or such other punishment as shall

Offences created by statute and defined therein.

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be ordered by the sentence of a general court-martial." Here the law defines an act as a crime when done with a particular intention, and therefore it is necessary in framing a charge under this article, to declare the intention of the act, by inserting the words "*to plunder and pillage.*"

It is, however, said, that "where a word, not in the statute, is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient."<sup>1</sup> But it is, at the same time, held to be much safer to pursue the words of the statute strictly, as thereby precluding all doubts as to the meaning of the words used; and particularly where the offence is capital,—as courts, *in favorem vite*, are sometimes willing to entertain very nice distinctions upon the subject.

The words of the statute to be followed.

Not necessary to cite an act as a breach of a particular article of war.

It is not necessary, nor is it desirable, to specify that the offence alleged has been committed in breach of a particular article of war. In cases where the offence comes directly within a particular enactment, it should be set forth in the terms used therein; but where the alleged offence is a disorder or neglect, not specifically provided for, it must be charged as "conduct to the prejudice of good order and military discipline." —(See 99th article of war.)

Must not be double. Each specification sets forth but one offence.

6. *It must not be double.*—That is, the defendant must not be charged with having committed two or more offences in any one count, or specification of the charge. Each specification can set forth but one offence. The accusation should

<sup>1</sup> Archbold's Crim. Plead., p. 47.

be written out in words at length, without abbreviations; and the charge be sufficiently explicit to support itself; for no latitude of intention can be allowed to include any thing more than is expressed.<sup>1</sup>

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Military charges should be set out as briefly as is possible, consistent with the requisites pointed out in the foregoing remarks. It is, therefore, to be observed, that allegations which are not essential to constitute the offence, and which may be omitted without affecting the charge, ought to be rejected as surplusage: and that in every charge or declaration, there should be contained, according to the opinion of a great lawyer, these two things—*certainty* and *verity*.<sup>2</sup>

Charges to be brief.

In concluding this chapter it is proper to observe, that it is a principle by which the power and jurisdiction of courts-martial are restrained, that they cannot take cognizance of any acts or offences which are not conceded by statute or the custom of war, as specific crimes against the military state, or as disorders and neglects tending to the prejudice of discipline and good order.

Courts-martial restricted in their cognizance of offences to such as affect the military state.

<sup>1</sup> Chitty's Crim. Law, Vol. I., p. 172.

<sup>2</sup> Coke's 1 Inst., Book III., p. 381.



## CHAPTER XV.

### OF THE JUDGE ADVOCATE.

#### CHAPTER

#### XV.

Preliminary remarks upon the office of judge advocate

To those who have ever had any practical acquaintance with the duties of the judge advocate, it must be evident that a full enumeration and description of them would compose a very comprehensive chapter. It certainly cannot be expected that in this work, a minute and precise statement of all that pertains to that situation, will be embodied; nor is it the intention of the writer to present to the reader more than a few of the prominent principles of action by which that officer should be guided; together with some general observations connected therewith.

It is indeed an extraordinary fact, that in all the legislation touching the administration of justice by military courts, there cannot be found but a few brief lines, which make any reference to, or state any regulations for, the conduct of the judge advocate. The mere provision for his appointment and compensation, makes up, almost entirely, the sum total of the notice given to him, and without any specific exposition of his character, or rules to determine the true sphere of his occupation, his rights, his duties, or his responsibilities!

It follows then, necessarily, that the regulations and principles for his guidance have been established, and as they now exist, by custom;

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and thence the difficulty which has often been experienced, when questions, calling for judicious settlement, have been agitated, as to what was the authority of a court-martial on one side, and what was the duty, or right of the judge advocate on the other. If rules are to be sought for, which can only find a sanction in custom, or former precedents, it is readily perceived, that considerable previous knowledge is requisite on the part of the officiating judge advocate, to enable him to discuss such questions, or to point out the true rule or principle to be observed either for his own guidance or that of the court; and yet this consideration was not, and is not, always entertained, when the necessity arises for the appointment of some person as judge advocate, to conduct a military prosecution.

There can be, when applied to the army of the United States, no doubt of the correctness of the observations in the preceding paragraph; and it is to such facts, that we may refer, almost exclusively, for the causes and explanations of the great irregularities, and numerous and constantly recurring errors, which have characterized the proceedings of courts-martial. It was indeed, enacted by the act of congress, "fixing the military peace establishment of the United States," of March 16, 1802, "that whenever a general court-martial shall be ordered, the president of the United States may appoint some fit person to act as judge advocate;" but in what that *fitness* was to consist, has never yet been officially determined or published. Now, it is generally conceded, that for a proper discharge of this office, there is needed qualifications and at-

Cause of errors.

What constitutes the fitness of the judge advocate.

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taintments of more than ordinary possession; that, as the duties are multifarious, and highly important, and therefore responsible, there should be a corresponding ability; a *fitness*, in a word, which can only be derived from experience, and knowledge of military life; its laws, customs, and modes of discipline; together with a competent acquaintance with the principles and maxims of criminal jurisprudence, and by which the proceedings in the ordinary law courts of the country are regulated. The particular rules for the government of military judicial proceedings, cannot be found in the laws alone; they must be sought for in the history of cases, or gathered from the compilations and treatises of military authors: for the experience of the most practiced individual, is not large enough to embrace all the accidents and contingencies of circumstance, which give diversity to the subject.

“Without (says a military writer,<sup>1</sup>) an adequate degree of knowledge in all of the above mentioned points, it is impossible for a judge advocate to direct and guide the members of a court-martial in the right path, so that justice be duly administered, the proceedings of trials correctly and legally conducted, and the members of the court protected from the penalties every member is liable to, should the court (*from not having a competent legal adviser, through ignorance, or inadvertency*) exceed its authority in deviating from the established law of the land.”

It is then, evidently a necessity, from all these considerations, that for the furtherance of justice for all parties, the judge advocate, whoever he

<sup>1</sup> Captain Hughes, Duty of Judge Advocates, p. 2.

may be, should, in every respect, be a *qualified* person.

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Defects in the  
laws for the ad-  
ministration of  
military justice.

Perhaps no military institutions ever existed in any country, in which the administration of justice was so little cared for by the government, as in those of the United States. It is not meant by this however, that the rights of persons are disregarded, but that the necessary and proper means for the due observance of legal rules in judicial proceedings, have been entirely disregarded by the national legislature. We might point to the manifest deficiencies which now exist in the laws authorizing trials by courts-martial, whereby such courts are left without the power of self-protection, and the want of a compulsory process, (through the ordinary courts of law,) to control witnesses, or obtain evidence. Does it not appear as a most anomalous and dangerous fact, that in trials where the highest interests of the government are at stake, or where the reputation or even life of the prisoner is in jeopardy, that these tribunals of justice, as they are frequently called, should be too feeble to punish contempts, and too inanimate, legally considered, to enforce testimony !

From this very condition of things, may it be argued, that an able and competent judge advocate is an indispensable ingredient for the safety of military courts. If the knowledge of one's strength is an element of safety, or means of self-defence ; so peculiarly in military matters, is the knowledge of one's weakness, an imperative want, to compass the like end. The defects of the military laws in these particulars, have at various times been brought to the notice of the

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Inequality of  
the operation  
of the laws up-  
on the military  
and the non-  
military citizen.

Judge advocate  
should be a sol-  
dier as well as  
a lawyer.

Union of such  
qualifications  
essential.

proper department of service, in hopes that a remedy might be found; but still, no attention has been given to the subject. As recently as the year 1839, did the members of a general court-martial, assembled at St. Louis, Mo., for the trial of Lieutenant Colonel Brant, of the quartermaster's department, bring the subject immediately to the view of the secretary of war, by a written statement of the difficulties under which they had labored, in reference to the direct refusal of a non-military witness to appear before the court and testify. And such cases are liable to be presented to every military court that may assemble. While the military man is subject to a double jurisdiction and responsibility, in matters which affect the interests or rights of a civilian, the latter may frequently avoid all accountability for misconduct towards the first, which involves in it the professional reputation of the sufferer.

"Persons who are appointed to act as judge advocates, may be considered fit from possessing superior attainments and abilities, either as lawyers or soldiers; but the qualifications of *both* professions are requisite for this specific duty."<sup>1</sup>

Now the union of the qualifications of both these professions is essential, not only because it is of importance to have sensible and well settled rules of procedure, even under the ordinary condition of things—but likewise that dangers and embarrassments may be guarded against, during emergencies of martial government when the courts of civil judicature are closed and silent. Such contingencies may arise when an army is

<sup>1</sup> Hughes, Duty of Judge Advocates, p. 178.

serving in a foreign territory, or when the law military is the predominant power. The proclamation of martial law (if ever constitutionally lawful) would be in itself sufficiently arbitrary, without subjecting suitors or prisoners to the additional grievance of arbitrary and capricious rules in law proceedings, and the utility therefore of courts-martial having a fixed and consistent code of regulations for their guidance is obviously certain.—How can such a code be established?

The answer to the above interrogatory is very easy. By the creation of a military law department, at whose head shall be a *military* person of competent attainments and experience; not selected for political associations, but on the contrary freed from all political duties, and who shall be, therefore, entirely unfettered by political interests or motives. To such an officer, as the JUDGE ADVOCATE GENERAL, would be confided the law proceedings of the army. Through him would the members of courts-martial receive the assistance, advice, and instruction, which they so frequently need; and by his careful supervision of all court-martial proceedings would erroneous principles and false practice be rejected, and legal views and uniform rules be confirmed. In connection too with the duties and labors of this officer, would it be particularly necessary, that all generals and colonels, having the authority to appoint courts-martial, should consider with somewhat more interest, than what heretofore has been the practice, the qualifications of persons which ought to constitute the fitness for the appointment of judge advo-

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Military law department required for the services.

Of the office of judge advocate general.

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Necessity of selecting proper persons to act as judge advocates.

cates, for without such attention, the good results of the system proposed, might be very materially lessened or hindered.

But without looking to any change in the organization of the law department of the army, (if change it can be called, in what hardly can be said to exist,) the writer would desire to impress upon the minds of all, who have an interest in the well-being of the army and navy, the great benefits to be attained, and the manifest evils to be avoided, by the proper selection of persons to officiate as judge advocates—of the person who is the legal adviser of the court, and who has been called by a writer “the *PRIMUM MOBILE* of a court-martial;” and who is appointed, as the court-martial is convened, for the same object—the attainment of justice.<sup>1</sup>

Requirement of the general regulations for the army

Although the general regulations for the army require all officers to make themselves acquainted with the laws and the practice of courts-martial,<sup>2</sup> still it is an impossibility that courts-martial should be always so composed, that each individual member is perfectly fitted for the duties which he is called upon to perform. This arises from the diversified conditions of military life; the youth or rank of the person appointed a member, or from other relations which he bears to the service, or to the party accused. Neither would it be possible for the appointing power to select members according to what he might deem the fitness of the person chosen, because this would be contrary to the principle of detail; might impose unequal burthens of duty upon different individuals; and moreover, be ob-

<sup>1</sup> Simmons, p. 152.

<sup>2</sup> Par. 221.

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noxious to the imputation of packing a jury. But all these difficulties may be in a great degree obviated by the selection of a judicious and competent judge advocate; and from no view of the subject, than the one just presented, does the propriety of such a means more clearly and emphatically stand revealed.

The above general observations, in which the writer has indulged, are such as he thinks would present themselves to any mind which had been engaged for any time with the subject under consideration; and it is because they are the most easy and natural to arise, that he deems them the more important and the most likely to be useful. Remarks upon this branch of the subject might be extended through many pages, and to the general reader, or the non-military student would be novel, and to some degree, useful; but as the great class into whose hands this work may be found are likely to be of the military profession, seeking for particular information to guide them in their practical duties, such prolonged remarks, however satisfactorily received, would hardly be necessary or useful,—he therefore resumes the consideration of particulars more directly applicable to the subject of the present chapter.

Direct subject  
resumed.

The power to appoint a judge advocate, or some person to officiate as such, whenever a general court-martial is assembled, is conveyed by the twenty-first (21st) section of the act of congress of March 16, 1802; and by the sixty-ninth (69th) article of the act of congress of April 10, 1806.<sup>1</sup> The broad interpretation given

Power to ap-  
point judge ad-  
vocates.

<sup>1</sup> Cross' Mil. Laws, pp. 104—117.



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to all legislation touching this authority is, that he who has the power to appoint general courts-martial has, *incidentally* as well as directly by statute, the power also of appointing some fit person to act as judge advocate.

In previous chapters (6th and 7th) there were some rules indicated for the guidance of the judge advocate which naturally presented themselves when describing the progress of the trial. It will not be necessary to repeat those rules here, unless it be in connection with some principle therein alluded to, and which may here require greater amplification.

Duty of judge  
advocates.

The duties of this officer are but very briefly alluded to in any part of the laws enacted for the government of the military state. The sixty-ninth (69th) article of war says, that he "shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself; and administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of the regimental and garrison courts-martial."

In considering the question of to what extent the judge advocate may lend his assistance to the prisoner, or the latter require the aid of the judge advocate, it is proper to remember, that in trials before courts-martial, according to the practice of British courts-martial, the judge advocate does not always occupy the position of prosecu-

tor: it is necessary to observe this, so that the titles of such persons, and their respective duties, be not confounded,—as they are not convertible.

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It was, for a long period, a prevalent notion that it was the official duty of the judge advocate to assist the prisoner in his defence. A little consideration will show, especially where he is the prosecutor, that such cannot be the case. To do so effectually would require a knowledge of the prisoner's means or points of defence, which would thus bring him in opposition to his own obligations and duty; but he might, and would most probably, if requested by the prisoner, give him all the assistance in his power. In court, the judge advocate could not aid the prisoner,—as he could not advise him, nor prepare questions for him; nor cross-examine the prosecutor's witnesses;—but out of court there would be no objection to his pointing out to the prisoner the way in which he might best conduct his defence. It is very evident, we think, that the provision of the sixty-ninth article, above quoted, was specially intended for the benefit of enlisted soldiers, whose ignorance makes the counsel of the judge advocate much more necessary than in other cases, and to whom it most forcibly applies. It would, consequently, be incumbent on the judge advocate, not only to see that no improper advantage be taken of the prisoner, by the admission of illegal testimony, but that he direct him how to present the facts upon which his defence may hinge, in the most effective light to the court. A prisoner may give a memorandum of the points on which he wishes his own witnesses examined, and the

How to assist  
the prisoner.

Object of the  
69th article of  
war.

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Speaking with  
prisoner before  
trial.

opposite party cross-examined, to the judge advocate, and request him to put the questions in his own words. In general terms it may be remarked, that it is the duty of the judge advocate to shape questions in legal form; to solve all difficulties as to the relevancy of facts adduced by either of the parties; to see that the prisoner shall not suffer from a want of knowledge of the law, or from deficiency of experience or ability to elicit from witnesses a full statement of the facts bearing on his case; and to this extent both the court and the judge advocate are bound to give their advice to the prisoner. He should also give him reasonable aid in his defence either in point of law, or of justice; and where doubtful questions arise, rather incline to the side of the prisoner,—and, above all, not omit any circumstances of the proceedings which might have a tendency to palliate the charges against the accused. As to the propriety of speaking with the prisoner before trial, Major Hough says, that he “conceives great good may often result, particularly in the case of a private soldier,—the judge advocate is more free from bias, it may be supposed, than any other person.” As to the propriety of this latter course there are various opinions, but the writer is inclined to believe that when followed by a judicious and impartial person, as the judge advocate is always presumed to be, great benefits to the accused party may result therefrom.

Summons witnesses.

The charges upon which a prisoner is to be tried having been placed in the hands of the judge advocate, he is to ascertain what witnesses or evidence will be necessary, both for the prosecu-

tion and defence, and thereupon, summon every person whose testimony may be required. This duty should be performed at the earliest period possible, to avoid any delay in the proceedings.

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In cases where the judge advocate has the task delegated to him of arranging a prosecution on particular grounds designated by superior authority, it is his business to inquire what persons have knowledge of the facts in issue, and all the particulars relating thereto, so that the court when assembled for the trial may not be needlessly delayed. In all cases it will prove of great assistance to himself, if he should prepare in writing, a short analysis or plan for conducting the trial and the examination of the witnesses.

Ascertains who have knowledge of the facts in issue, prepares a plan.

He is to furnish the accused party with a copy of the charges, as soon as possible, or ascertain if such has been transmitted to him from another source; and should a change or alteration be made in the charges, the prisoner should be immediately apprized of it. The judge advocate is not strictly obliged to furnish the prisoner with a list of witnesses for the prosecution—though it is usually done; there seems no objection of a general nature to exist against this custom—should there be any in particular cases, the judge advocate might refuse it, and to him therefore the decision of how to act is left.

Furnishes prisoner with copy of charges, list of witnesses if necessary.

The law has not provided any specific form of summons for witnesses, but in whatever manner it may be composed, its language should be at once courteous and specific.

“A judge advocate is the main-spring of a court-martial, on him the court depends for in-

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judge advocate  
before a court  
martial.

formation concerning the LEGALITY as well as the REGULARITY of their proceedings. IF HE ERRS, all may go wrong."<sup>1</sup> From this it follows that a duly appointed judge advocate is essential to the jurisdiction of a court martial; and without him it cannot proceed. The judge advocate appears before a court-martial in a threefold capacity:—*First*, As an officer of the court for the purpose of recording its proceedings; he reads the warrants, administers the oath, arraigns the prisoner, and puts questions to witnesses. *Secondly*, As the adviser of the court in matters of form and law—and *Thirdly*, As public prosecutor.

How far subject  
to the court.

"In the first of these characters, he is subject to the court, who may direct their proceedings to be conducted and recorded in any manner which they think proper; but in the other two characters, the court can exercise no control whatever over him, as in the performance of these duties he must be allowed to act according to his own judgment and discretion."<sup>2</sup>

Cannot be chal-  
lenged; may be  
absent for a  
time and resume  
his place.

The judge advocate cannot be challenged on any grounds, as he acts at a general court-martial in behalf of the United States. And he may be absent during a part of the trial, (another filling his place for the time,) and return and resume his duties without invalidating the proceedings.

Either of the  
parties has a  
right to the  
judge advocate's  
opinions.

It is admitted, that either of the parties has the right to the opinion of the judge advocate either *in* or *out* of court, on any question of law arising out of the proceedings.<sup>3</sup>

It is a part of the judge advocate's duty to be

<sup>1</sup> Adye, p. 100.<sup>2</sup> Kennedy.<sup>3</sup> Simmons.

careful that a court-martial does not proceed to trial without being properly constituted. This is clearly an important matter for his attention, and one, considering the general features of his office, for which he is appointed.

The question, offering to the prisoner the option of challenge must be recorded; and the right of challenge belongs to the judge advocate also, and to be exercised whenever the interests of the public shall require it.

Between the adjournment on one day, and the meeting on the next, the judge advocate prepares a fair copy of the proceedings, which upon the reassembling of the court is read over. The court may dispense with the reading if it pleases, but it had better be done. There are important advantages to be derived from the observance of such a rule. It not only impresses more clearly the evidence itself upon the mind of the court, but enables them while the recollection of it is fresh, to detect any errors, which, by inadvertence, may have been committed in the transcript.

It is the essential duty of the judge advocate to see that the charges which have been committed to him for prosecution, are presented to the court in a legal form, and with such distinctness that they shall correspond to the requirements indicated in a preceding chapter. When charges are furnished to the judge advocate from headquarters in a specific form, there may be some doubt as to his right of making any alteration therein, and therefore should any defect be seen, he had better call the notice of the proper authority to it, whenever time and distance will

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To see that the court is properly constituted.

Question to the prisoner offering the option of challenge to be recorded. His right to, challenge.

Fair copy of proceedings to be made out. To be read over.

Charges to be presented in legal form.

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Legal defects in  
charges to be  
amended.

Changes in  
charges the  
most frequently  
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Judge advocate  
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reply.

permit. It is undoubtedly, however, his duty to amend the legal defects of charges, before the prisoner is called upon to plead thereto; for this seems to be an essential part of his business—yet in so doing he is to be held strictly responsible that the facts are not changed, nor the legal responsibilities of the accused weakened. There is an order embodying the above instructions for the guidance of the judge advocates, still in force, and to such may reference be had for the exercise of the rights or powers here alluded to. The changes which are most frequently needed to be made, are mostly confined to form and phraseology—to simplify the first, and prune the redundant fullness of the other, comprise the ordinary elements for notice. As has been previously remarked, that the manner in which charges are drawn up, is a primary requisite for the doing of justice in general, and of peculiar value in isolated cases, it would seem to be a necessity that the person upon whom is devolved the onus of the prosecution, should likewise be of such fitness as to be entrusted with the responsibility, and endowed with the discretion to change or modify the charges, either as legal necessity or practical rules shall require.

It is conceded that the judge advocate has the right to reply in any case, whether evidence has been adduced by the defence or not. By a reply is understood the right of observing on the evidence in general; or by controverting any new matter, which may have been introduced by the prisoner in his defence, by other testimony. In the practice of the British army, there is a distinction observed in regard to this point

—depending upon the fact whether the prosecution is conducted wholly by the judge advocate or by a private prosecutor—and in the latter case the court exercises a discretion in permitting a reply or not. This difference in the practice of a foreign service has been referred to in this particular, and at other places of this work to other questions, upon which there seemed a diversity of opinion, because in the references which young or inexperienced members of our service may make to British authorities, there might otherwise be a misunderstanding of the principle, or a perplexity in applying it to our practice.

New matter may be considered as any thing introduced into the defence on which the prosecution has had no previous opportunity of addressing the court; and where a reply is desired by the judge advocate, the court will always grant a reasonable time for its preparation.

A rejoinder is not a matter of right, and is never permitted by courts-martial, unless evidence has been adduced on the reply.

It appears to be a propriety imposed by legal provision, as well as being deducible from the particular duties of the office, that no person, other than one subject to martial law, can appear before a general court-martial as prosecutor. The twenty-first section of the act of congress of March 16, 1802,<sup>1</sup> authorizing the president to appoint some fit person to act as judge advocate, whenever a general court-martial shall be assembled, manifestly intended to confine the selection of such person to the army, by fixing

New matter.

Rejoinder not a matter of right.

Judge advocate to be subject to martial law.

<sup>1</sup> Cross' Mil. Laws, p. 104.



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advocate, although the proper person, appointed under the law as the judge advocate for the army, was present. Upon the objection and argument of the defendant, the court decided that the person thus appointed to conduct the prosecution in addition to the regular judge advocate, could not appear, and he withdrew, in consequence, from the court. It is a positive right of the prisoner to have counsel, to assist him in his defence; and it is also acknowledged that the prosecution may be assisted by counsel; but this counsel can take no further part in the proceedings, than by being present and advising upon such points with the judge advocate as may demand his attention. Now it does not follow from this, that a person may be admitted as counsel, at the instance, and in behalf of persons who may have an interest in the result of the trial, independent of the United States, in whose name the prosecution is urged; because, if this were allowed, it would be mingling private animosities, or personal resentments, with the stream of public justice. The most striking exemplification of this principle, and by which the rule has been clearly defined, was exhibited upon the trial of Commander Alexander Slidell Mackenzie, of the U. S. Navy, in February, 1843, who was charged with *murder on board a United States vessel on the high seas*. Upon the third day of the meeting of the court, the judge advocate presented a paper signed by two eminently distinguished legal gentlemen, stating, "that they had been employed by the relatives of Midshipman Philip Spencer, one of the persons for the murder of whom Commander Mac-

Counsel allowed.

Counsel not admitted at the instance of others, not parties, having an interest in the issue.

Instance quoted from the trial of Commander Mackenzie, U. S. Navy.

kenzie was then upon trial,—to attend the trial and take part therein, by examining and cross-examining the witnesses who might be produced, and propounding such questions, and offering such suggestions in relation to the proceedings, and presenting such comments on the testimony, when the same should be concluded, (under the approbation of the court,) as they might deem necessary.” The court took the subject thus presented for their notice, into the gravest consideration; and having maturely deliberated thereon, decided, that the application could not be granted.<sup>1</sup>

The views, thus expressed in the decision of the court, were certainly correct. It is seen that the persons in whose behalf the counsel were engaged, were not in any respect parties to the question at issue, nor occupying such a position in relation thereto, as authorized any judicial notice of them. The trial was not in the nature of an appeal, at the instigation or declaration of one individual against another, but solely at the suit of the United States, having for its object the vindication of discipline, and the satisfaction of public justice. In so solemn a matter as was then presented for adjudication, involving a question of law and morals, of reputation and of life, the weightiest inducements were presented to the minds of the court, for a just and conscientious decision—to admit nothing which might prejudice the rights of the prisoner, to exclude nothing which could mar the just claims of private safety.

Reasons for the  
rule.

In cases where it is necessary to have the as-

<sup>1</sup> See the Trial, by J. F. Cooper, pp. 8, 9.

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Accuser may  
remain in court  
after having  
been examined.

Accuser when  
not a military  
person can ap-  
pear only as an  
informer or wit-  
ness.

Judge advocate  
to be prosecutor  
in all cases.

Advantages of  
the above rule.

sistance of the accuser, or the person who has suffered by the acts or conduct of the accused, all that can be insisted upon on the part of the prosecution is, to ask of the court permission for such person to remain, after being examined as a witness—to whom reference may be made for information, or particulars of the offence charged. And if a person bringing forward an accusation against any person in the army or navy, is not himself an officer either of the army or the navy, he can only appear in court as an informer—or a witness.

It has been thought by some, to be a bad practice to make the judge advocate the prosecutor, because it is said to throw an unfair weight into the scale against the prisoner, and this happens from his naturally feeling some desire to succeed in the prosecution; from being privy to the consultations of the court, he may bear hard against him; and that he is also the legal adviser of the court. But on the other hand, it is contended that it is the safer rule to make the judge advocate the prosecutor in all cases. Not being a party, and having no interest in the issue, he must be considered as unprejudiced against the defendant, and being entirely impartial, he stands forward as the public prosecutor, only to see justice done between the accused, and the accuser.<sup>1</sup>

Whatever arguments may be advanced to support either the one or the other proposition, the writer is decidedly in favor of the latter opinion, and thus would prefer to see the judge advocate always occupy the place of prosecutor.

<sup>1</sup> Hough.

From his own experience, he has no doubt that this course saves a great deal of time to the court, and prevents the exhibition of violent feelings, or intemperate language on the part of the parties, when they are brought in opposition in the presence of the court; and he is led to this conclusion, not from having seen a contrary practice, (of which he can now recal no instance,) but from the observation of the resentful and embittered feelings which are sometimes provoked by the mere appearance of a party in the character of a witness.

Military law is in general plain and simple in its provisions, and requiring but good sense to interpret it, either in justice or equity; though should a legal difficulty arise, there is the judge advocate to whom reference can be made; and if he has been appointed as a duly *qualified* person, no deficiency will ever be experienced in the conduct of the prosecution. It is objectionable, too, to have the presence of many persons taking part in the business of the court, as it in general only tends to prolong and complicate the proceedings. As it has been before remarked, that, under the present laws for the constitution of courts-martial for the land service, no other prosecutor than the judge advocate can appear, the above remarks would hardly be necessary, as not being applicable to any diversity of opinion or practice which might arise; but in the naval service, as there is still some latitude of indulgence claimed on that head, they may not be altogether useless.

The manner in which military prosecutions before courts-martial are to be conducted, has not

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Principle governing the form or procedure of courts-martial.

Remarks upon the proposed departure from settled rules, in the trial of Commander Mackenzie.

been regulated by any statutory provisions. But as the principle is acknowledged and prevails, that in every instance in which forms or rules of proceeding before such courts have not been established by legal requirements, or settled by custom, the procedure must be in accordance with the practice which governs criminal trials in the ordinary courts of law. The rules, then, which are to govern courts-martial in the investigation of charges submitted to them, are easily arrived at, and have been generally understood. It was therefore a matter of some surprise, that in the trial of Commander Alexander Slidell Mackenzie, the judge advocate should have proposed a novel way of conducting the prosecution, not only adverse to all former precedent, but to some extent deemed perilous to the prisoner. Believing that his position was different from that in which it had been customary to view him, he said he did not consider himself as occupying the place of a prosecuting law officer in the civil tribunals, but believed his duty to be akin to that which was devolved on the English judges at that time when traversers were put on trial without the privilege of counsel; and therefore claimed the right of asking any questions which would be legal, from *either* side.<sup>1</sup> The extent of this right, so claimed, would have been indefinite, and have amounted to an indulgence never allowed, (excepting under particular circumstances of difficulty in eliciting a fair and full statement from a reluctant witness,) of cross-examining, and, as a consequence, of impeaching the witnesses called by himself.

<sup>1</sup> J. F. Cooper's Trial, pp. 6, 7.

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Now this proposition was directly in opposition to the rule above given, as it departed from the usual mode adopted in the criminal courts. It would have substituted a rule which had tolerance during a more imperfect condition of criminal jurisprudence than now exists, but which has long since given way to privileges, which have been accorded to the prisoner, under more humane and enlightened views. But the rejection of the proposition, then made by the judge advocate, could have had no effect to limit the indulgence, if any, which the prosecutor might have been disposed to grant the prisoner, but was merely restrictive of a power to impugn his own testimony, whenever it did not meet the opinion or expectation with which it had been presented. Now although the judge advocate is prosecutor for the United States, and as prosecutor, is to be regulated by certain acknowledged principles, still it does not therefore follow, that he is to be otherwise than perfectly impartial. He is neither to omit any thing which in justice to the prisoner ought to appear; nor on the other hand, is he to permit the interests of the public to suffer, and a criminal go unpunished through lenity or any motive whatever. The prosecution requires firmness,—and misfortune, for that is frequently interwoven with guilt, demands compassion;—compassion, which softens the rigors of a severe justice, and lends its comforting and reforming suasion, to reclaim the criminal from the paths of vice.

Judge advocate  
to be perfectly  
impartial.

It is when the court is closed for the consideration of the finding and sentence, that the judge advocate is called upon for the exercise of

Duty of judge  
advocate in  
closed court.

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a sound discretion. It would certainly appear to be an unfair advantage given to the prosecution, should the judge advocate, when the court is closed, be permitted to urge a verdict of guilty, by the presentation of any argument. This would be a prejudice to the accused by reason of his absence, and who, if allowed the like opportunity, might offer very good reasons for an opposite conclusion. The duty of the judge advocate seems to be at such times, to put the court on their guard against deviation from essential forms, or violation of justice in their final judgment. It might be perfectly proper for him to point out the relevancy of testimony, or its legal value, but not to attempt to weigh it, and decide upon its preponderance to one side or the other; for that is the peculiar and exclusive duty of the court. In whatever matter the judge advocate takes part, in this stage of the proceedings, he should endeavor to distinguish between what really is of a ministerial, and what of a judicial character. Of the first, it belongs to him to speak; but with the second, he is in no degree authorized to interfere. Should it happen that a court-martial persevere in an illegal measure, or an unjust opinion, the judge advocate ought to enter upon the record, the opinion given by him; for though he would not be warranted (or allowed) to enter his dissent in the form of a *protest*, as such a method implies a judicative voice which he does not possess, still his opinion upon the controverted point should be engrossed with the proceedings, in order that it may be seen that he has performed his duty, and be "absolved from all in-

Protest not allowed, but the judge advocate may record his opinion.

putations of failure in his duty of giving counsel. The error or wrong may be then fairly brought under consideration of the power with whom it lies in the last resort, either to approve, and order into effect, or to remit the operation of the sentence."<sup>1</sup>

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While the judge advocate is excluded from all right to dictate opinions or sentences to a court, it is on the other hand, his particular province to give counsel or advice, and his own discretion must suggest when that may be proper or necessary.

To give counsel  
and advice.

It is incumbent, likewise, upon the judge advocate, whenever the court demands his opinion to give it fully and freely,—and even when not requested, it is his duty to call the attention of the court to any particular fact, or circumstance, which may tend to guard them from error.

Must give an  
opinion when  
required, by the  
court

It is held, indeed, that "the attendance of a judge advocate at a court-martial could be of no use whatever, were he not allowed to insert in the proceedings any opinions of importance which he may have given during a trial, whether they were adopted by the court or not."—and

Propriety of re-  
cording the  
opinions of the  
judge advocate.

"The opinions offered by the judge advocate form an essential part of the proceedings, and that without their insertion, the record does not exhibit a true and faithful account of all that took place during the trial; and, consequently, that the approving officer becomes called upon, without being apprized of the circumstances, to decide upon the merits of a case which has not been fully and correctly submitted to him."<sup>2</sup>

<sup>1</sup> Tytler.

<sup>2</sup> Kennedy.



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Court may control the language of an opinion. Judge advocate responsible for.

It thus seems to be a well settled point, that whenever any thing occurs in the progress of a trial which calls for the declaration of an opinion of the judge advocate, it is proper that such opinion should be entered on the record; and the only control which the court may exercise over it, consists in their right to exact of the judge advocate, that the opinion thus given be couched in respectful terms and decorous language. A departure from this requirement, would, on the part of the judge advocate, make him amenable to censure.

Considerations for the weighing of testimony, and duty of the judge advocate.

Now, although it has been said, that it is not the duty of the judge advocate to weigh opposing evidence, and discuss the same for the purpose of influencing the decision of the court; yet it is undoubtedly his duty, should he observe the court inclined to find a verdict *contrary* to evidence, to point out the same and prevent, if possible, a wrong decision. In the distinction here endeavored to be presented, it must be seen that the difference arises from what is a mere *conclusion* in the minds of the court, from the consideration of opposing evidence, and a *fact*, which has been misunderstood, and by which that conclusion is to be determined.

The value of the judge advocate's opinions.

The value of the opinions of the judge advocate, thus entered upon the record, may, at some future period, be well demonstrated for the protection of the members of the court, by presenting with more particularity to the attention of the approving authority, the merits of the controverted points, and thereby preventing, at times, the execution of their judgment; which, if illegal, would render them liable to damages in a civil

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action. It is true that judges must necessarily be allowed considerable indulgence for the errors which they unintentionally commit, as no one can be so perfect as always to avoid them;—a mistake, therefore, into which an honest, well-meaning man may innocently fall, would not make him liable to punishment; but the law presupposes in the magistrate a sufficiency of knowledge to enable him to execute justice; and presumes that he knows, what it is necessary, in the nature of his office, he should know;—ignorance of the *law* would not, therefore, excuse him. So with members of courts-martial, who, when sitting in a judicial capacity, are subject to the same rule; and, consequently, should they obstinately, in defiance of the statement of law made by the properly appointed legal adviser of the court, proceed to judgment, they could not expect impunity for the wrong.

The law presumes that the judges understand the law—their responsibility.

The duty of the judge advocate may be understood as “being *at this stage* of the proceedings, simply to act as registrar of the court, and to advise on legal points when his opinions may be demanded; he necessarily abstains from making any remarks by which his judgment, as to guilt or innocence of the prisoner may be ascertained.” But—“if at any time, by inadvertence, a member in passing sentence should deviate from the letter of the law, or assume a power at variance with it, it is clearly the duty of the judge advocate to point out the error.”<sup>1</sup>

Judge advocate as registrar of the court.

It is likewise said that “when the court is passing sentence, the judge advocate ought not then to offer any opinion, as he is in no man-

When passing sentence the judge advocate offers no opinion, and is not answerable for it.

<sup>1</sup> Simmons, p. 212.

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ner answerable for the adequacy or inadequacy of the punishment which the court may award."<sup>1</sup>

General rule  
when the court  
is deliberating  
upon the find-  
ing or sentence.

From the above observations it may be concluded as a rule,—that when the court is deliberating upon the finding, or the sentence, the judge advocate should interpose an opinion only when there is danger of an irregular or illegal decision being made; and that in all questions within the discretion or competency of the court to determine, he should take no part. To the members themselves attaches a responsibility for every act; and while they honestly observe the limits of legal authority defined for their guidance, they are independent of all other control.

Caution to be  
observed by  
judge advocate.

It is here recommended particularly to the attention of all persons officiating as judges advocate, to be cautious not to irritate the court by frequent and unnecessary opposition. There is no part of the judge advocate's duty which demands a larger portion of good sense for his government than this—and which, if not properly observed, will most assuredly lead to disagreeable results. Young men, when acting in the capacity of judge advocate, are sometimes obtrusive of their opinions, and pertinacious in pressing them when no sufficient cause exists for so doing. Frequent, or dogmatic contradiction of the views which a court-martial are inclined to follow, destroy thereby the just influence of the prosecutor, and but exacerbate the feelings, without enlightening or assisting the judgment of the members;—for such interruptions are looked upon as the mere promptings of

<sup>1</sup> Kennedy.

egotistical pride, or the petty vanity of assumed knowledge.

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A judge advocate should not, therefore, make *points* for discussion; nor insist upon recording his opinions on *trifles*. An ingenuous remark, will frequently be sufficient to call the attention of the court to matter of doubtful propriety, and elicit a just attention to the subject. Whenever a question arises which is essential to the just conclusions of the court, and upon which the opinion of the judge advocate is requested—or if the court pursue a way in contradiction to what he believes to be necessary and lawful, it will be his duty to express his views thereon, in the just fulfillment of his office.

In so doing the utmost deference to the dignity of the court should be apparent; a delicate courtesy and modest demeanor should be characteristic of his address, while his argument may be replete with all the vigor and energy which knowledge imparts, and which truth demands.

Propriety of expression to be observed.

It is in reciprocal good feelings between the court and their law adviser, that justice finds the surest support. In the respect which the one should manifest for the body, as whose counsel he is appointed, is found the source of that just confidence in the minds of the other, which lightens all their labors,—and without which the judge advocate is more of an incumbrance than an aid.

Mutual confidence between the court and judge advocate.

The business of the court having been concluded, the record of the proceedings is signed by the president of the court, and countersigned by the judge advocate. The ninetieth (90th)

Record to be signed and transmitted.

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article of war prescribes in what manner the same shall be disposed of, by directing that "Every judge advocate, or person officiating as such, at any general court-martial, shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial to the secretary of war, which said original proceedings and sentence shall be carefully kept and preserved in the office of said secretary, to the end that the persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof."

Original proceedings.

By the *original* proceedings and sentence of the court-martial, is meant the fair copy which has been submitted from day to day for the observation and inspection of the court.

Record, how disposed of.

The disposition of the record is not literally in consonance with the directions laid down in the above cited article of war, because the exact observance of it would not expedite a decision by the approving officer, but, on the contrary, would retard it; and, moreover, conflict with the intention of the preceding article, which gives to every officer authorized to order a general court-martial, the power to pardon or mitigate any punishment ordered by such court—except in certain cases,—when he is to transmit to the president, for his determination, the proceedings of the court. In consequence of such power vested by the law, the record is always transmitted direct to the officer who has commanded the court to assemble.

Judge advocates for courts of inquiry.

The duties of a judge advocate before a court of inquiry, are in many respects the same, as

when officiating before a general court-martial—though of limited extent.

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A court of inquiry may be composed of from one to three officers, with a judge advocate or suitable person as recorder, to reduce the proceedings and evidence to writing; all of whom are to be sworn according to a prescribed oath.—(*See 93rd article of war.*)

Composition of  
court of in-  
quiry.

The judge advocate prepares the case for investigation. He summons the necessary witnesses, and gives notice to the parties interested, as to the place and time of meeting. Although he does not act in the capacity of a prosecutor, nor has a deliberative voice in the proceedings, still it is his duty to examine the witnesses, (as he is often peculiarly fitted so to do, by previously making himself acquainted with the leading points of the subject of investigation,) and thus facilitate the business of the court. Whatever aid the judge advocate may be enabled to lend the court, towards a full knowledge of the merits of the case, he is bound to offer; for it is to his exertions, as well as of the members of the court, that a searching inquiry into the very minutiae of the subject of investigation may be made. The judge advocate also swears the witnesses, in the same way as they are sworn before a court-martial; and he records the testimony and keeps the proceedings from day to day, after the like manner.

Duties of judge  
advocate on  
courts of in-  
quiry.

As the proceedings of a court of inquiry, by having the witnesses sworn, partake of a judicial character, the judge advocate must be considered as a legal adviser to the court, and he is therefore bound to see that no improper evidence

Judge advocate  
the legal advi-  
ser.

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is admitted, and to put the court on their guard against the commission of legal errors. He also will assist the court in methodizing the testimony it may receive, and afford all other assistance by which the whole circumstances of the case may be developed, and laid before the convening authority in a clear and explicit form.

First meeting of  
the court of in-  
quiry.

Upon the first meeting of the members appointed to constitute a court of inquiry, the judge advocate reads the warrant or order directing the assembling and appointing the members and judge advocate; he demands of the parties if they have any objection to any member, which question, together with the answers, must be recorded. The court is then sworn by him, after which the president of the court administers to him the prescribed oath.

Special instruc-  
tions read.

Should any special instructions have been given to the court for their guidance or government, in the inquiry about to be entered upon, the judge advocate will now read them—and all these particular acts are to be recorded in the proceedings.

Mode of proce-  
dure decided.

The court, when necessary, will deliberate upon the best mode of procedure, and having decided that point, the complainant (if there is one) and the accused will be called in. The witnesses are next called and examined, and the evidence regularly taken down, in the same order that is observed on trials before courts-martial.

Fair copy of  
proceedings.

The judge advocate makes up a fair copy of the proceedings from day to day, which are read over at the next meeting of the court.

The business of the court having been com-

pleted, the record will be authenticated by the signature of the president and the judge advocate, and by the latter transmitted to the authority by which the court was convened.

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Record authenticated and transmitted.

Naval courts of inquiry.

Authority, by legislative sanction, has been also given for the ordering of courts of inquiry for the naval service; and such authority is vested in "the President of the United States, the secretary of the navy, and the commander of a fleet or squadron."<sup>1</sup> The same provisions for the government of the court in the latter case have been declared, as those which exist for army courts of inquiry—and therefore the remarks which have been presented above are equally applicable to the one as the other.

Such, as are embraced within the observations comprising the present chapter, appear to be the distinguishing traits of the character of the judge advocate,—his rights, his duties, and his obligations. Important as the functions of his office are, and so much dependent on the proper exercise of them, it is somewhat strange, that so great a period of time should have been permitted to elapse, without having the one clearly defined, and the other judiciously governed; and although, in the present essay, the author can hardly pretend that he has accomplished so necessary an object, still he indulges the hope, with a well settled confidence, that, in the little which he has attempted, the services may find a decided benefit.

Observations.

<sup>1</sup> Homan's Naval Laws, p. 66.



## CHAPTER XVI.

### OF EVIDENCE.

#### CHAPTER XVI.

Evidence, difference of extent for civil and military investigation.

THE subject of evidence, which presents so wide a field, to be scrutinized by those who are engaged in the administration of justice, in the ordinary or civil walks of life, is of comparatively limited extent as applied for the purposes of military investigation: and this, because in the latter cases there is a greater similarity in the questions to be considered, arising from the absence of those diverse conditions, and complicated circumstances both of law and facts, which distinguish judicial proceedings in the ordinary courts of justice.

Leading principles of evidence, important to military men.

It is unnecessary, therefore, that military persons should be possessed of a knowledge of those niceties and distinctions, in regard to evidence, which is so essential to the legal practitioner in his daily business; but as the rules which govern courts-martial are the same as those obtaining in the criminal courts of the land, it is of essential importance that military men should well understand the general principles of the law of evidence.

Founded in experience.

These are gathered from the past, in the gradual experience of able men, whose lives have been devoted to the science of law, and been confirmed by time. They are founded on the "observations of human conduct, on common

life, and living manners," and are acknowledged as "rules of law because they are just and reasonable;"<sup>1</sup> and are not, therefore, to be regarded as mere arbitrary *dicta*, upon the observance of which a formal uniformity may be preserved, or the convenience of the court ensured, but as great moral truths which govern or influence the acts and opinions of men, and are essential to be known and defined for the safety of society.

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In the observations which it is the intention of the writer to embody in the present chapter, and which, in substance, are derived from approved writers on evidence,<sup>2</sup> it will be necessary to observe the distinction remarked upon above, and to designate such rules and principles only which demand observance by, or are more particularly applicable to the practice of courts-martial. The subject will be treated of under the following heads: 1. Of evidence in general. 2. Of direct or positive evidence. 3. Of presumptive evidence. 4. Of the competency of witnesses. 5. Of the examination of witnesses.

Distinctions to  
be observed.

1. *Evidence* is that which (independent of all comment and argument,) is legally submitted to a court, or jury, to enable them to decide upon the questions in issue. Evidence and *proof* are often confounded, as implying the same thing; but they differ widely. Proof is the legal credence which the law gives to evidence,—while evidence is the legal mode in which that proof is made: and hence the law will admit of no proof which is not made in accordance with its established principles. These principles or rules, then, relate to, and are to regulate or determine

Definition of  
evidence.

<sup>1</sup> Phillips' Evidence.

<sup>2</sup> Phillips, Starkie, and others.

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the quality and admissibility of evidence, the means or instruments by which it is conveyed to the minds of the jury, the method of procuring and using them with effect, and the quantity and sufficiency of evidence for the proof of particular facts or issues.

Evidence is of two kinds, *parol* and *written*.

*Parol evidence.*

*Parol Evidence*, is such as is given by witnesses in open court, and is understood to be of matters within the personal cognizance of the speaker.

*Written evidence.*

*Written Evidence* consists of records; deeds; books of account; military orders; letters, &c., which are admissible after the particular proof of their authenticity has been presented.

*Of what evidence consists.*

Evidence consists of those facts and circumstances, which can be communicated by competent and legal means to a jury, to enable them to decide upon the questions in issue; and since facts are fleeting and transitory, their history must be drawn from the only depositories in which it can reside,—the memories of living witnesses, or written documents in which such facts have been recorded.<sup>1</sup>

Having in view the above definitions, the first consideration is—what facts and circumstances may be communicated to the minds of the jury, assuming that their existence can be established by competent means? and what are those means of communication, or by what instruments may facts be conveyed to the understanding of the jury?

By facts and circumstances, are meant all things and relations, whether natural or artificial,

<sup>1</sup> Starkie, p. 14.

which really exist, whether their existence be perceptible by the senses or otherwise;<sup>1</sup> and it is clear that a fact may be communicated to a jury, and is in itself communicable, provided it can be so communicated by adequate or competent means; and under such conditions the consideration would be—has the fact been communicated in such a manner, as to authorize the jury, legally, to notice it.?

The general rule upon the subject is this, that all facts and circumstances, upon which any reasonable presumption or inference can be founded as to the truth or falsity of the issue or disputed fact, are admissible in evidence; provided, such facts and circumstances can be substantiated by legal means. This rule, however, is subject to some exceptions growing out of considerations of policy. General rule.

When direct evidence can be obtained of the disputed fact, it is essential also to justice, that such evidence should be liable to contradiction and confirmation from collateral circumstances;—and

From the frequent failure of direct evidence, there arises a necessity of depending wholly upon presumptions and proofs from collateral circumstances.

2. *Direct or positive evidence*, is when the facts in dispute are communicated by those who have had actual knowledge of them by means of their senses, and where, therefore, the jury may be supposed to perceive the facts through the organs of the witness. Of this, it is not necessary to speak further, as the very definition of it is Direct or positive evidence.

<sup>1</sup> Starkie, p. 15.

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sufficiently explanative,—the witness speaking directly to a fact, from his own immediate knowledge.

Presumptive  
evidence.

3. *Presumptive evidence* is, as the language imports, where a fact or circumstance not directly or positively known, is presumed to exist, or to have had place, from other facts or circumstances which are known. This is also called circumstantial evidence. This is a branch of the subject upon which observations might be multiplied to a great extent. It has engaged the attention, and commanded the reasoning powers of many able writers ; and its vast importance in all judicial proceedings, is emphatically declared, in saying, that private interests and public safety are dependent upon a discreet understanding, and appreciation of the principles by which it is governed.

Evidence an in-  
ductive science.

Evidence may be called a purely inductive science, depending, as it does, upon reason, experience, and reflection. Being progressive in its nature, it involves considerations of the physical or mechanical, and the moral and intellectual world, and opens up to the mind, one of the broadest fields for speculation and study.

Basis of pre-  
sumptions.

The basis of all *presumptions*, is evidently the necessary or usual connection between facts and circumstances, and the knowledge of which is the result of observation and reflection ; we accordingly infer the existence of a fact, not positively known, from the connection which it has with others which are known ; and upon this principle all our knowledge of those relations and existences, which are not perceptible by the senses, must depend. The force of these prin

ciples is perceived by all mankind, by the unlearned as well as the learned, and acted upon daily in the ordinary occurrences of life. It is their *natural* truthfulness which recommends them for the guidance of man; and presumptions could never have been adopted as the means of proof, before a jury, if their nature and force could not be estimated by men of plain and ordinary sense and discretion.<sup>1</sup>

The human mind is manifestly adapted to the general laws of nature,—moral and physical, and they consist in the regular connection and uniform operation which is to be observed in the same circumstances and ideas. If this were not so, there could be no system; and mere casual or fortuitous coincidences would destroy, or rather make useless, all experience and observation. But as experience constantly points out the generality of the laws of nature, this generality becomes a principle, and hence a safe rule of deduction is established, and so dependent upon it, that it is assumed that what has occurred once, will occur again under the same circumstances. The passions and motives of mankind, which so diversify conduct, are enduring throughout time, or modified only by different objects, partial restraints of law, and artificial manners and customs of life. A knowledge therefore of the human character, acquired in the same way by which a knowledge of the mechanical laws of nature is obtained, by experience and reflection, is sufficient to establish such principles of presumptive proof for the ascertainment of the conduct of individuals, as will fully satisfy the judg-

<sup>1</sup> Starkie, p. 23.

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ment, in the absence even of all positive testimony.

Presumptions, and strong ones, are continually founded upon a knowledge of the human character, and the motives, passions and feelings by which the mind is usually influenced. The effect of particular motives upon human conduct, is a matter of every man's observation and experience to a greater or less extent; and in proportion to his attention, means of observation, and acuteness, every one becomes a judge of the human character, and can conjecture, on the one hand, what would be the effect and influence of motives upon any individual under particular circumstances; and on the other hand, is able to presume and infer the motives by which an agent was actuated, from the particular course of conduct which he adopted.<sup>1</sup>

Necessity that  
circumstantial  
evidence be  
well under-  
stood.

It is deemed essential to the well being, if not to the very existence of society, that the nature of circumstantial evidence should be well understood, that the secrecy with which crimes are committed, should not secure impunity to the offender. But at the same time, it is to be remarked, that in no case, and upon no principle, can the policy of preventing crimes and protecting society, warrant any inference which is not founded on the most full and certain conviction of the truth of the fact, independently of the nature of the offence, and of all extrinsic considerations whatever. Nor should the nature of the crime be permitted to influence in any case, the measure of proof; and circumstantial evidence is allowed to prevail to the conviction of

<sup>1</sup> Starkie, p. 28.

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an offender, not because it is necessary and politic that it should be resorted to, but because it is in its own nature, capable of producing the highest degree of moral certainty in its application.<sup>1</sup>

These general observations will be, it is believed, sufficient to point out to the reader, the distinctive characteristics of the subject,—a prolonged or minute inquiry would too far depart from the object of this work, and swell to an inconvenient bulk the volume, which is intended merely as a convenient reference to the leading principles of the law, which is to be the guide of military men in their practical duties and relations as members of courts-martial; and as the works of the most standard, or approved writers upon the subject of evidence, in which the doctrines relating thereto are fully discussed, are of easy procurement; the writer refers others to the same source, from which he has derived the principles herewith presented. He will, therefore, confine himself to the statement of the more specific and practical rules.

Reference to  
writers on evi-  
dence—practi-  
cal rules.

First.—*Evidence is to be confined to the points in issue.*

Evidence con-  
fined to point in  
issue.

The sole object and end of evidence being to ascertain the truth of the disputed points in issue, the introduction of any, not having a clear reference, either directly or collaterally to the subject, would be manifestly unnecessary. Such a license would be attended with certain evils and inconveniences. It would swell the record to the hindrance of the service, perplex the business of the court by presenting many useless questions for interlocutory decision, and would

<sup>1</sup> Starkie, p. 480.



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be unjust to the prisoner, by calling upon him unexpectedly, to answer at once for any action of his life. This rule is peculiarly forcible in, and applicable to, criminal prosecutions; and therefore all manner of evidence which is foreign to the point in issue, ought to be rejected.

Plain as this rule is, there is still sometimes a difficulty to ascertain what particular evidence is applicable to the questions to be decided. The definition given of evidence must be referred to, and that will generally, if properly considered, aid the court to determine. Circumstances which have not an immediate tendency to prove the point in issue may have an indirect or consequential tendency to that effect, and should therefore be admitted whenever the consequence is made apparent.

It may be proper, too, to permit an inquiry into other facts than those charged, because it may be shown that they have a bearing on the questions before the court, and constitute presumptive proofs—whereas without such a consequence the inquiry would be altogether irrelevant—so a question upon a cross-examination may be rendered necessary, which on the examination in chief was decidedly improper.

The crime of desertion, is one depending upon *intention not to return*, and therefore any fact connected with the absence of the prisoner may be inquired into, in order to ascertain the existence or non-existence of such intention. But this evidence must only be received for this purpose, and cannot be permitted to operate at all to determine the degree or nature of punishment, unless the prisoner be expressly charged

with the commission of such act or acts as an offence or crime, and be placed on trial for the same.

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It is not allowable to show that the prisoner has a general disposition to commit the same kind of offence as that charged against him; as that would be to some extent substituting an opinion for a fact, and raise an issue other than the true one for the court's determination. Thus in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time, and had a tendency to such practices, ought not to be admitted.<sup>1</sup> But there are particular offences or crimes, in which knowledge or intention on the part of the prisoner is necessary to conviction, and therefore the proof of similar transactions or acts, or previous declarations, is admissible. For instance, on an indictment for uttering a bank note, knowing it to be forged, proof that the prisoner had passed other forged notes of the same kind, is evidence that he knew the note in question to be forged. And on a prosecution for uttering counterfeit money, the fact of the prisoner having other counterfeit money upon him, or of his having uttered other pieces of money of the same kind, is evidence of his having known that the money which he uttered was counterfeit. Such evidence it must be apparent is very material, for the gist of the offence charged upon the prisoner is that he did act with knowledge, and it could not often be ascertained, under what circumstances the uttering took place, whether from ignorance or with

Not allowed to show a general disposition to commit a particular offence.

<sup>1</sup> Phillips, p. 136.

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intention to commit a fraud, without inquiring into the demeanor of the prisoner in the course of other transactions. But this kind of evidence, whatever weight it may have, is to be received only as of *another transaction*, not as evidence of *another offence*. The same description of evidence is constantly admitted in trials for murder; in which previous resentments, menaces, or threats against the deceased are evidence of the prisoner's malice.<sup>1</sup>

Plea of justification or excuse  
—Contemporaneous conduct.

Under the plea of not guilty (which puts in issue all material parts of the charge), the prisoner may give in evidence any matter of justification, excuse, or extenuation. And if other acts besides those, the subject of the charge, have been proved against him, in order to show his design in the affair, he will be permitted to explain those parts of his conduct, and for that purpose may give in evidence, other *contemporaneous* particulars of his conduct which show that he had a different design from that imputed to him. The limitation, that the particulars offered in evidence by the prisoner ought to be *contemporaneous* with those proved on the other side, or at least confined within the same limits to which the evidence on the part of the prosecution is subject, is founded upon the propriety of not allowing the prisoner the whole range of his life, during which his character and designs may have undergone a complete change.

Prisoner may prove character.

The prisoner is allowed also to call witnesses to prove his character; but then it must be understood that character unconnected with the charge cannot be admitted as evidence to influ-

<sup>1</sup> Phillips, p. 137.

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ence the finding of the court. General character thus presented for the notice of the court may be of advantage by modifying the punishment to be decreed by the court, or presenting the case to the reviewing authority as one in which mercy may be exercised, and thus procure pardon for the offender, or mitigation of the sentence.

Courts-martial will always permit the prisoner to present evidence of character, and do not require that it should bear analogy, and have reference to the charge in issue, and such testimony when the evidence against him is doubtful may be sufficient to warrant an acquittal.

Of the advantages and object of such evidence.

Evidence as to the general character of a prisoner is submitted to the court after the defence, by testimony, has been made; though questions tending to elicit such may be made frequently in the course of the investigation by the accused.

It must be apparent, that wherever intention is a principal ingredient in the offence charged, depending too upon presumptive proof, evidence as to character which applies directly to the nature of the accusation may be exceedingly important. Therefore when evidence of a prisoner's character, given by credible witnesses, is of a warm and affectionate description, it should be received as going far in favor of the prisoner. Expressions of good will towards the deceased, by one accused of murder, are always considered of great importance, as going to show the absence of malice, and that therefore the intention was not what the charge imputes. A general character for sobriety, honesty, and good tem-

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per, is certainly to be allowed great influence, to operate against the presumption of malice and premeditation which a crime of such magnitude necessarily supposes; and in all similar cases the like principle applies.

Of particular  
characteristics.

So particular characteristics of a prisoner may be given in evidence, to rebut a charge of crime, to which the testimony offered is analogous in character. One charged with theft, would very naturally prefer evidence of character for honesty, and which would, if satisfactorily set forth, be entitled to great weight. And so a charge which should impugn the courage of a soldier, would be much weakened by evidence of the former bravery and resolution of the accused. But in all cases where particular traits of character are shown, care must be observed, in order that the merit or excellence of the personal qualities of the prisoner be not confounded with their applicability as proof; for it would be very irrelevant to the issue when considering a charge of theft, to allow character of courage in the balance of proof; and equally so, would evidence of honesty be, when deliberating upon a charge of cowardice. These qualities or dispositions of men are not repugnant to the belief of particular crimes, and no doubt, are frequently and reciprocally existent with persons who commit the offences above referred to.

Inquiry to be as  
to the *general*  
character.

Whenever the prisoner is permitted to call witnesses to general character, and in every case of doubt, proof of good character will be entitled to great weight, the inquiry must be always as to the *general* character, for it is the general character alone which can afford, or

raise a presumption that the person who had maintained a fair reputation down to a certain period, would not then begin to act a dishonest or unworthy part. It frequently happens that witnesses, speaking of the general opinion of the prisoner's character, state their own personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favor to the prisoner than strictly as evidence of general character.<sup>1</sup>

It has been usual, says a very sensible writer, to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the prisoner, character, however excellent, is no subject for their consideration; but that when they entertain any doubt of the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference, that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual, whose character was previously un-

Evidence of  
character, how  
to be consider-  
ed.

<sup>1</sup> 1 Phill. Ev.

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blemished, has or has not committed the particular crime for which he has been called upon to answer.<sup>1</sup> (2 *Russ.* 703.)

Bad character of prisoner not to be given in evidence, unless,—nor particular facts.

The prosecutor cannot enter into evidence of the defendant's bad character, unless the latter enable him to do so, by calling witnesses in support of his good character, and even then the prosecutor cannot examine as to particular facts.<sup>2</sup>

No evidence to contradict the record.

As the court is sworn to try and determine the matter before them, that is the matter in issue between the parties, no evidence need be given to prove any points which are admitted on record, and none can be received to contradict the record.<sup>3</sup>

Evidence to prove conspiracy.

There is a description of evidence which has been acknowledged by high judicial authority to be admissible to prove particular offences, which, as a general rule, might not be otherwise universally received. This relates to conspiracy, and is, therefore, to be a rule for the observance of military courts in trials for mutiny and sedition, to which it bears a striking analogy.

Number necessary for a conspiracy. Mutiny and sedition may begin and end with one.

With regard to conspiracies in general, it is to be observed, that the nature of the offence requires that more than one person should be concerned in its commission.<sup>4</sup> And so in mutiny and sedition, two or more persons are frequently parties thereto; though it does not follow that it requires more than one to commit the offence;—it may begin and end with one individual. “It is not necessarily an *aggregate* offence, committed by many individuals; for it may originate and conclude with a single person,—and be

<sup>1</sup> Roscoe's *Crim. Ev.*, 72, 73.

<sup>2</sup> *Ibid.*, 73.

<sup>3</sup> 1 Starkie, 387.

<sup>4</sup> Roscoe's *Crim. Ev.*, p. 313.

as complete with one actor in it, as one thousand."<sup>1</sup>

The acts and declarations of the prisoner himself, on former occasions, may not only be admitted, when referable to the point in issue, but also the acts and declarations of other persons with whom he has conspired, may, if referable to the issue, be given against him in evidence.

In prosecutions for conspiracies, it is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any *act* done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of law, as well as in sound reason, the act of the whole party; and, therefore, the proof of the act will be evidence against any of the others, who were engaged in the same general conspiracy, without regard to the question, whether the prisoner is proved to have been concerned in the particular transaction,—for it is evidence, as acts connected with, and in conformity with, his own acts. If, therefore, on the trial of a charge of mutiny against several persons, in assembling unlawfully for the purpose of exciting discontent or disaffection, the material points for the consideration of the court are, the general character and intention of the assembly, and the particular case of the defendant as connected with that general character. And it is relevant to show in evidence resolutions proposed by one of the defendants at a meeting at another place or time, for the same professed object and purpose as were avowed at the meet-

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Declarations by  
prisoner on former  
occasions.

Act done by  
one conspirator  
considered the  
act of all.

<sup>1</sup> Samuel, Law Military, p. 257, and Hough, 68.



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Letters and  
writings offered  
in evidence of  
conspiracy.

ing in question. For in a question of intention, it is most clearly relevant to show, against that individual, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices.

Letters and writings, also, of one of several conspirators, are frequently offered in evidence against others.

Papers found in the custody of the prisoner are admissible in evidence, without any proof of the hand-writing being his.

The letters or writings must appear to have been written in furtherance of the conspiracy, and not as a mere relation of a past transaction. "Correspondence," said Eyre, C. J., "very often makes a part of the transaction; and in that case, the correspondence of one who is a party to the conspiracy, would undoubtedly be evidence—that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what has been done, appears a different thing."—*Hardy's Case*, 24 How. St. Tr. 452, 475.

It is not necessary, in order to render the letter of one of several conspirators evidence, that it ever should have reached the hands of the person to whom it was addressed. Letters thus intercepted have been allowed to be read in evidence, on the ground that it was a letter from one conspirator to another conspirator, and having relation to the conspiracy, the tendency and nature of which it contributed to show.

Time and place  
of finding such  
writings.

With regard to the *time* and *place* of finding such letters or writings, it is obvious that they ought to be such as to afford presumption that

the documents are genuine. Where letters have been intercepted after the apprehension of the prisoner, they have been disallowed as evidence, on the ground that they had never been in the custody of the prisoner, or any way adopted by him—or that there was nothing to show the existence of the writings previous to the prisoner's apprehension, or that he was a party to them. But if there be a presumption of the previous existence of the writing it will then be admissible.

Where letters and writings are offered in evidence, in these cases, it must appear that they are connected with the objects of the conspiracy, and that they are not merely the speculative opinions of the party by whom they were written. But if they be so connected, then, though they may never have been published, they are admissible in evidence.

Not only are the *acts* and the written *letters* and *papers*, of one of several persons engaged in the same conspiracy, evidence against the others, done or written in furtherance of the common purpose, but his verbal declarations are equally admissible under similar restrictions. Any declarations made by one of the party in pursuance of the common object of the conspiracy, are evidence against the rest of the party, who are as much responsible for all that has been said or done by their associates in carrying into effect the concerted plan, as if it had been pronounced by their own voice, or executed by their own hand. These declarations are of the nature of *acts*; they are in reality acts done by the party, and generally they are far more mischievous

Verbal declarations admissible.

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than acts which consist only in corporal agency. All consultations, therefore, carried on by one conspirator relative to the general design, and all conversations in his presence, are evidence against another conspirator, though absent. The effect of such evidence must depend on a variety of circumstances, such as whether the party was attending to the conversation, and whether he approved or disapproved—still such conversations are admissible in evidence.

Acts and declarations admissible in evidence for the prisoner.

Evidence of other acts and declarations of the prisoner, as it is admissible for the prosecution under the restrictions above stated, so it is also admissible on behalf of the prisoner. For the design and intention of a party, at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration.

Acts and declarations in favor of prisoner, to be connected in subject and time, &c.

The acts and declarations of a prisoner, given in evidence in his favor, ought to be connected both in point of subject matter, and of time, with the acts or declarations proved against him.<sup>1</sup>

Witness must speak to facts. Opinions on questions of science, &c.

In general the opinion of a witness is not evidence: he must speak to facts, and these the court deliberates upon and applies by its own judgment. On questions of science or art, however, it is allowed to persons of skill to speak, not only to facts, but to give their opinions in evidence. Evidence of character is founded on opinion, and the opinion of a medical man is evidence as to the state or condition of a patient—and in such cases he would be questioned

<sup>1</sup> Roscoe's Crim. Ev., pp. 59 to 66.

as to the best of his knowledge, opinion, or judgment. In all cases where there may exist any doubt as to the propriety of requiring the opinion of a witness, the first consideration should be, is the opinion asked for one of mere art, or technical, or scientific knowledge, separate from the question in issue—or is it declaratory of the matter under trial? If the latter, of course it cannot be received as that is the very point to be decided by the court.

It is said, that “every question is admissible of a military man, where it is founded on local knowledge or circumstances which are not within the reach of all the members of the court; but where it is merely a question of military science, to affect the officer who is undergoing his trial, it is obvious that the court is met for no other purpose but to try that; and that they have before them the facts in evidence on which they are to ground their conclusions.” In cases affecting the conduct of the accused, either as to deportment or language, it is perfectly proper and often necessary, to require a witness to declare his opinion, because such opinion may be derived from the impression of a combination of circumstances occurring at the time referred to, difficult if not impossible fully to impart to the court; but it would be manifestly improper to draw the attention of a witness to facts, either derived from his own testimony or that of another witness, and to ask his opinion as to their accordance with military discipline or usage, because the court, being in possession of facts, are the only proper judges of their tendency.<sup>1</sup>

<sup>1</sup> Simmons, p. 367.

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A court should never require the opinion of a witness, when, by the investigation of facts, they would be themselves competent to form a correct judgment. A ship-builder has been admitted to prove the sea-worthiness of a ship, by his opinion founded on facts stated by others. So an artillery officer might be allowed to give an opinion as to the probable effect of cannon, if directed as assumed; and in all questions of opinion, touching matters of art or science, they are allowed, if they are not of a nature to be presumably known to each member of the court.

It is unnecessary to proceed with further remarks, illustrative of this branch of the subject; in every instance in which opinions may be required, the nature of the case will, generally, be sufficient to guide the court; and a reference to the principles by which this description of evidence is limited or regulated, as stated in the preceding pages, will aid to a correct decision.

Affirmative of  
the issue to be  
proved.

Secondly.—*The affirmative of the issue is to be proved.*

The difficulty, and at times the impossibility of proving a negative, as well as the maxim of law, which declares that every man is to be presumed innocent until the contrary be shown, has made the rule now stated, of essential and necessary observance. There are, however, exceptions to the observance of this rule, growing out of policy or necessity; but so few, that an accused person is not likely to suffer from the misapplication of them.

Exceptions to  
the rule.

To elucidate the exceptions, it will only be necessary to refer to the cases cited in the books on evidence, and which present the principle so

clearly, that military courts may easily apply it whenever necessary. Thus, in an action on the game laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified; yet it is not necessary to disprove his qualifications; but it will be for the defendant, if he can, to prove himself qualified. The proof here for the defendant would be positive, as the knowledge of such qualification is peculiarly within the party himself; but the prosecution would most probably have no means of proving, negatively, the disqualification.<sup>1</sup>

But where one person charges another with a culpable breach of duty, the rule is, that he who makes the charge, is bound to prove it, though it may involve a negative; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary be proved. It is a general rule of evidence, that the burden of proof lies on the person who has to support his case by proof of a fact, of which he is supposed to be cognizant.<sup>2</sup> So a party who pleads his infancy, must prove it.<sup>3</sup> That is, although in general, it is necessary for a party to prove all the material facts which he alleges, yet where the defendant pleads a fact within his own knowledge in discharge of himself, the burden of proof lies upon the defendant—not upon the plaintiff.

General rule of  
evidence.

This rule is not founded on any presumption in law in favor of the party, but is merely a rule of practice and convenience; and it ceases in all cases where the presumption of law is thrown

<sup>1</sup> 1 Phillips, 149.

<sup>2</sup> Ibid., 151.

<sup>3</sup> 1 Starkie, 377.

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into the other scale. So it may, in general terms be said, that whenever the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative.

Best evidence  
to be produced.

Thirdly.—*The best evidence to be produced of which the nature of the case will admit.*

This is a primary and signal rule of evidence, for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it.<sup>1</sup> The true meaning of this rule, is not that courts of law require the strongest possible assurance of the matter in question, but that no evidence shall be given, which from the nature of the thing supposes still greater evidence behind in the party's possession or power; for such evidence is altogether insufficient and proves nothing, but carries with it, a presumption contrary to the intention for which it is produced. Thus if a party offer a copy of a will or deed, where he is able to produce the original, this raises a presumption that there is something in the deed or will, which if produced, would make against the party; and therefore the copy, in such a case, is not evidence. But if he prove the original will or deed to be in the hands of the adverse party, to whom he has given notice to produce it, or that the original has been destroyed without his default, no such presumption can reasonably be made, and a copy will be admitted, because then such copy is the best evidence that can be produced. A witness cannot testify as to the con-

<sup>1</sup> Gilbert, Ev., p. 3.

tents of a paper in his possession ; it should be produced.

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Now, although the best evidence which the case admits of, must be produced in evidence, still it does not follow, that the law requires the strongest possible assurance of a fact ; on the contrary, if the evidence to a fact is of the best possible *kind*, the mere accumulation of identical testimony is unnecessary. So if a transaction should be witnessed by twenty persons, one, or two, or three, would be as sufficient to prove it as the entire twenty ; and therefore it is, that one credible witness is sufficient to prove a fact, except in cases where the law has designated a different rule.

Accumulation  
of identical ev-  
idence unneces-  
sary.

Offences are at times committed with such privacy, that it is impossible to prove them otherwise than by the testimony of the complainant or the party injured ; such evidence becomes then of the best possible kind of which the case admits, and is consequently received ; and where no doubt of the credibility of the witness exists, is considered sufficient to warrant a conviction.

Of the evidence  
of complainant.

This rule is easily illustrated by supposing the case of a soldier, or officer, entering the quarters of his superior or commanding officer, and there, no other persons being present, using opprobrious and threatening language to him, or behaving in a violent and mutinous manner. Such a case has occurred, and the offender been dismissed the service.<sup>1</sup>

In reference to this particular part of the subject, it is to be remarked, that in deciding upon

<sup>1</sup> See case of Lieutenant Thackery, R. N., reported in 2 McArthur, 56.



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Satisfactory evidence is alone required, not dependent upon number of witnesses.

the effect of evidence, the question is, not by how many witnesses a fact may have been proved, but whether it has been proved satisfactorily, and so as to convince the understanding. The number of witnesses, is not always conclusive in matters of proof, more than the number of arguments on a subject of reasoning. A witness cannot be suspected merely because he stands alone, for it is clear that the testimony of a single witness may be so clear, full and free from all suspicion and bias, as to convince the most doubting and scrupulous; while, on the other hand, many witnesses may declare the same fact, and yet none be worthy of credit. It is the character of the witnesses, and the character of their evidence that ought to prevail; not their number.

Primary and secondary evidence.

The best evidence is distinguished as *primary* evidence, and the inferior as *secondary* evidence.

Secondary evidence is admissible, where the primary evidence, being documentary, is either lost or destroyed, or where it is in the hands of the opposite party, or of his privy or agent; or in the hands of a person privileged from producing it, and who, upon being required to do so, insists upon his privilege; or where in cases as in tablets let into walls, it is impossible to produce the originals in court, without great inconvenience.

Notice to produce.

Where a document is in the hands of the other party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received.

Where, from the nature of the prosecution, the prisoner must be aware that he is charged

with the possession of the document in question, a notice to produce it is unnecessary. It is not sufficient to dispense with notice to produce, that the party in possession of the document has it with him in court. Nor is it necessary that the notice should be in writing; and in order to render it effective, the notice should sufficiently point out the document required to be produced.

It is sufficient to serve the notice either upon the prisoner himself, or upon his counsel.

The only consequence of giving a notice to produce, is that it entitles the party giving it, after proof that the document in question is in the hands of the opposite party, or his agent, to go into secondary evidence of its contents, and does not authorize any inference against the party failing to produce it. If the party who calls for the papers inspects them, this will render them evidence for the other party; though it is otherwise, if he merely calls for them without inspecting them.

A due degree of diligence must be exercised in looking for a document supposed to be lost, and this will depend, in a great measure, on the importance of the document. In the case of a useless document, the presumption is, that it has been destroyed. And where the loss of a paper may almost be presumed, very slight evidence of such loss or destruction is sufficient.

Diligence to be used in looking for papers supposed to be lost.

Where it is the duty of a party in possession of a document, to deposit it in a particular place, and it is not found in that place, the presumption is, that it is lost or destroyed.<sup>1</sup>

And in respect to persons, it is sufficient to

<sup>1</sup> Roscoe's Crim. Ev., 7 to 12.

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As to the character or capacity of others.

prove that they acted in the character set forth, without producing their appointments; and therefore upon a charge of disobedience or neglect of orders against an officer or a soldier, it is sufficient to show that the officer giving the order had previously, in the knowledge of the accused acted in the capacity alleged. And a prisoner may be proved a soldier by showing that he received pay as such, and acted in the capacity of one, without producing or proving his enlistment.

Proof of handwriting.

In proving the handwriting, the evidence of third persons is not inferior to that of the party himself. Such evidence is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired precisely by the same means, as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony therefore of such persons, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true. If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow that it is equally admissible for the purpose of *disproving* it—the question of *genuine* or *not genuine* being the same in both cases.<sup>1</sup>

The simplest and most obvious proof of handwriting is the testimony of a witness who saw

<sup>1</sup> Roscoe's Crim. Ev., 5.

the paper or signature actually written. But where this positive proof cannot be obtained, the best evidence of which the case admits, is the information of witnesses acquainted with the supposed writer—who, from seeing him write, have acquired a knowledge of his handwriting; for in every person's manner of writing there is a prevailing character which may easily be discovered by observation; and when once known, may be afterwards applied as a standard to try any other specimens of writing, whose genuineness is disputed. A witness may therefore be asked, whether he has seen a particular person write, and afterwards, whether he believes the paper in dispute to be his handwriting. This course of examination involves two questions—the first of identity, as whether the supposed writer is the person of whom the witness speaks—the second, of comparison in the mind of the witness, between the general standard and the writing produced.

This kind of evidence, like all probable evidence, admits of every possible degree, from the lowest presumption to the highest certainty. It may be so weak as to be utterly unsafe to act upon, or so strong as to produce conviction in the mind of any reasonable man. The reliance therefore to be placed on this species of proof, must depend upon the qualities of perception or intelligence to some degree of the witness, of his opportunities and kind, of observing the writing of the supposed writer—whether he has been in the habit of seeing him write daily, and down to the time of speaking, or whether it has been of but casual observation, and at a remote

Opportunities of witness, if he has seen a person write he may speak to his handwriting.

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period—or at intervals when the specimens submitted to his view, from hurry or other cause were not a fair average of his general style of writing. It is certain, that under such varying circumstances, the impressions on the mind of the witness will also vary—be very clear and perceptible, or faint and inaccurate. But whatever weight the testimony of the witness may have, it is an established rule that if he has seen the person write, he will be competent to speak to his handwriting.<sup>1</sup>

Other means by which handwriting may be identified.

But it is not essential to the proof of handwriting, that the witness should have seen the party write. There are various other ways in which he may have become acquainted with the handwriting. If a witness has received letters, purporting to have been written by a particular person, and on particular business, or of such a nature as makes it probable, that they were written by the hand from which they profess to come, he may be admitted to speak to that person's handwriting; and the admissibility of the evidence must depend upon this, whether there is good reason to believe, that the specimens, from which the witness has derived his knowledge, were written by the supposed writer of the paper in question. And in general, if a witness has received letters from the party in question, and has acted upon them, it is a sufficient ground for stating his belief as to the handwriting.

A document not proved by comparison with other writing.

In general a document cannot be proved by comparing the handwriting with other handwriting of the same party, admitted to be genuine; and the reason is, that specimens might be

<sup>1</sup> 1 Phillips' Ev., 364 to 366.

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unfairly selected to serve the purposes of the party producing them, and therefore not exhibiting a just specimen of the general character of the handwriting. The rule as to a comparison of handwriting does not apply to the court, who may compare the two documents together, when they are properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting. But the document with which the comparison is made must be one already in evidence in the case, and not produced merely for the purpose of the comparison—because it would be suspicious to select a document, unconnected with the question, to be put in, merely for the purpose of comparison with one already before the court.

Comparison to be made with papers in evidence only.

In the case of ancient documents, where it is impossible that the usual proof of handwriting can be given, the rule as to comparison of hands does not apply. Thus authentic ancient writings may be put into the hands of a witness, and he may be asked whether upon a comparison of those, with the document in question, he believes the latter to be genuine.

Of ancient writings.

Whether the evidence of persons skilled in detecting forgeries is admissible, in order to prove that a particular handwriting is not genuine, is a point not well settled. It has been considered as a question of art, which might be answered by a witness of skill and experience, and therefore admitted; but in other cases precisely similar evidence has been rejected—again admitted—and again refused. The question is therefore left open for an established rule.<sup>1</sup>

Of persons skilled in detecting forgeries.

<sup>1</sup> 1 Phillips' Ev., 364 to 373, and Roscoe's Crim. Ev., 161 to 164.

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The substance  
of the issue only  
need be proved.

Fourthly.—*The substance only of the issue need be proved.*

This is a portion of the subject of evidence which calls for particular attention on the part of members of courts-martial; not only because a neglect or ignorance of its true meaning might often tend to the escape of offenders, but might also involve a defendant in the consequences of a crime with which he was not legally charged. It is therefore necessary to understand, what variance in the proof of facts, and the averments of the charge, is to be considered immaterial or fatal.

Substantive  
crimes to be pro-  
ved.

It is a distinction which runs through the whole criminal law, that it is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified; but the offence however of which he is convicted must be of the same class with that with which he is charged.<sup>1</sup>

Under this rule it appears, that upon an indictment for *petit treason*,<sup>2</sup> if the killing with malice was proved, but not with such circumstances as to render the offence *petit treason*, the prisoner might still have been found guilty of wilful murder upon that indictment. And so upon an indictment of *murder*, the prisoner may be found guilty of manslaughter—for the indictment contains an allegation of manslaughter. And where a charge alleges that the defendant *did, and caused to be done* a certain act, it is sufficient to prove either the one or the other.

<sup>1</sup> Roscoe's Crim. Ev., 74.

<sup>2</sup> By the English laws killing under certain circumstances, was called *petit treason*, which made the prisoner liable to an aggravated penalty.

Where the *intent* of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only.

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Sufficient to  
prove one in-  
tent.

But where a person or a thing, necessary to be mentioned in an indictment, is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved; otherwise it would not appear that the person or thing is the same as that described in the indictment. And it has been held that an allegation in an indictment, which is not impertinent or foreign to the cause must be proved, though a prosecution for the same offence might be supported without such allegation. The court will be more strict in requiring proof of the matters alleged in a criminal, than in a civil case.<sup>1</sup>

Description of  
person or thing.

In indictments for murder, where the manner or means of killing is proved to agree in substance with the means charged, it is sufficient—as where the indictment is for killing with a dagger, and the evidence prove a killing with a staff—or where the indictment be for killing with one sort of poison, and the proof is of a different kind, the indictment is maintained, because the proof of the instrument is not absolutely necessary to the proof of the fact itself. But if the charge is for poisoning, and the death is proved to have been caused by striking or starving, this evidence would not support the indictment, as the species of death in one case is totally different from that in the other.<sup>2</sup>

If an indictment charges that A. gave the

<sup>1</sup> Roscoe's Crim. Ev., 75, and note.

<sup>2</sup> 1 Phil., 157.



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mortal blow, and that B. and C. were present aiding and abetting, &c.; but the evidence shows that B. struck, and that A. and C. were present, &c.; the variance is not material, for the stroke is adjudged in law to be the stroke of every one of them.

General rule.

The general rule is, that if the whole of an averment may be struck out without destroying the cause of action, it will not be necessary to prove it.<sup>1</sup>

Of the name of  
the accused.

Wherever the name of the party against whom an offence is committed, it is a matter of description, and must be stated;—and if the name be that by which the person is generally known it will be sufficient. It is not necessary that there should be any *addition* to the name; and where a person has a name of dignity, he ought to be described by that name, and as it forms part of the name itself, and is not an addition merely, it must be proved as laid.

Where a name, which it is material to state, is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient.<sup>2</sup>

Averment of  
time.

It is a rule that every material fact which is issuable and triable, must be averred to have happened at a certain time. However, it will not be necessary to prove the time precisely as laid, unless that particular time is material. Although an indictment, not alleging any time at which the offence was committed would be bad, yet it never was necessary, upon an indictment, to prove that the offence was committed upon the particular day charged.

In indictments for crime, prosecuted before

<sup>1</sup> 1 Phil., 158, and Roscoe's Crim. Ev., 83.    <sup>2</sup> Roscoe, 81.

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the ordinary courts of law, it is sufficient, in general, to prove that the offence was committed in the county in which it is laid to have been committed, and a mistake in the particular place in which an offence is laid, will not be material. And although the offence must be proved to have been committed in the county where the prisoner is tried, yet after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are admissible in evidence.

Before courts-martial, however, the distinctions noticed above are not necessary, because such courts have a jurisdiction of military offences, co-extensive with the country; and a crime committed in any one geographical division, or department of the army, may be tried in any other. The question, then, of jurisdiction of a court-martial does not depend upon the *place* where the crime is committed, but upon the *person* offending, and the particular description of *offence*.

Jurisdiction of courts martial does not depend upon the place where the crime was committed.

Still it is necessary, in framing a military charge, that the place where the offence is supposed to have been committed, should be laid with *certainty*; and this because such allegation may, at times, be essential to the defence of the prisoner; but it does not follow that a variance between the proof of the place where the crime was committed, and the place as laid in the charge should acquit the prisoner;—it is sufficient to identify the prisoner with the perpetration of the offence.

Place to be stated in the charge.

A soldier, then, accused of deserting the service from one place, on the 1st day of a particular month, but who, on the trial, was clearly

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shown to have deserted on the specified day, from a different place, would justly be convicted; for the essence of the crime is made out, and the place from whence he deserted, makes no part of the offence, but is a mere circumstance of description. But if the time and place were exhibited by the evidence, as so variant from those stated in the charge, that there was a possibility of the prisoner having repeated the offence, he would necessarily be acquitted, because the act charged and the act proved, are distinct offences.

Of an *alibi*.

To lay the *place*, in a charge, enables the prisoner to prove an *alibi*. Yet such a defence cannot be available, where the crime alleged against the prisoner is clearly made out to have been committed by him at the *time* stated, although at a different *place*,—for here the place stated has been a mistake, and the crime and criminal clearly exposed. But where the crime, and the place of its perpetration have been satisfactorily proved, and the defence set up is an *alibi*, the question is one as to the prisoner's identity; and evidence of his being at another place, at the time of the commission of the criminal act, will be sufficient to acquit him. And hence it follows, as the jurisdiction of courts-martial is extended without limit as to place, that a mistake of the place, unless the place be material, will not affect the proceedings; and that the acts of the prisoner, tending to establish the charge wherever committed, may be given in evidence.<sup>1</sup>

A soldier charged with *desertion*, may be found guilty of *absence without leave*; for absence is

<sup>1</sup> Simmons, p. 381.

the principal question in issue, and the intention or design, is the distinguishing trait of the offence alleged. And so generally, in all other species of accusations, where the proof is not sufficient to warrant a conviction of the specific offence laid in the charge, but where a substantial offence has been made out to the prejudice of good order and military discipline, the verdict may be found accordingly. In every case of this kind, where a minor degree of guilt is found, it must be understood that the breach of a particular article of war, is not expressly and exclusively laid in the charge.

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Finding a minor degree of guilt than that charged.

The notice of this part of the subject, involves a consideration of the 83d article of war, which, from the want of a uniform understanding of its intention, spirit, and authority, has occasioned frequent perplexity in the deliberations of courts-martial, and a consequent diversity in their decisions.

Notice of 83d article of war.

“Any commissioned officer, convicted before a general court-martial, of conduct unbecoming an officer and a gentleman, shall be dismissed the service.”

Conduct unbecoming an officer and a gentleman.

Such is the language of the law,—a law intended to preserve the honor and morals of the army, as a distinctive or professional body.

In all the legislative enactments, or minor regulations for the government of the army, it is to be observed that the essential object in view, is the good order and military discipline of that body; it would therefore appear, that no act of a military person, which does not offend against such principle, could be held as within the cognizance of a court-martial.

Observations.

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In measuring the turpitude of any conduct by the law just quoted, it is necessary in the first place, to state with particularity the acts of which the prisoner is accused, in order not only that he may be possessed of all fair means of defence, but that the court may have likewise the power to judge of the reasonableness and justice of the imputations which the charge alleges. The writer is aware of some of the difficulties which have been thrown around this subject by the very indistinct, and confused opinions which have been expressed by several British military writers, when treating of a similar article of war for the government of the English army—and by the difference which exists in the language of the two articles of war, in the respective services.

There are terms employed in the British article of war which stand as a guide to the meaning of it, which have been discarded in the American, but when the subject is considered, must necessarily be understood as implied in the latter, in order to give it a proper application.

The article of war now under consideration, declares that, "any commissioned officer convicted, before a general court-martial, of *conduct unbecoming an officer and a gentleman*, shall be dismissed the service;" whereas, the similar article in the British military code denounces the penalty of cashiering against "any officer who shall behave in a *scandalous, infamous manner*, unbecoming the character of an officer and a gentleman." The difference adverted to is very material, and in the one affords a rule by

which punishment, for conduct unbecoming an officer and a gentleman, is to be measured, or furnishes the means of ascertaining the description of such conduct so as to bring it by military cognizance, within the denunciation of the law.

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Now, it is apprehended, that conduct unbecoming an officer and a gentleman, before it can be legally made the cause of punishment, must be shown to be of that kind as necessarily to reflect disgrace upon the body to which the offender belongs. And this disgrace must not be such as the accidental or capricious judgment of different courts-martial might view it; but be referable to the certain and expressed opinions or feelings of the community at large.

What conduct unbecoming an officer and a gentleman is.

By this it is intended to say, that the partial judgments of men based on mere professional conventions or notions of honor, (because such may vary with different men, and at various places,) are not to be the standard altogether, but that the imputations grounded on the particular acts, which make the subject of the charge, must be determined or rejected according to the established and acknowledged morals of the christian world.

The article in question does not particularize any species of conduct as unbecoming an officer and a gentleman, but leaves that to be determined by the opinions of the world, or by those of the court-martial, from the acts alleged, and from which the military community might be prejudiced or receive detriment, were it to countenance behavior in any of its members which was of such a nature as to involve scandal and infamy.

The article of war does not particularize any species of conduct.

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There are, undoubtedly, certain acts, which, however immoral, do not import *infamy*, and are not liable, in any of the departments of social life, to punishment by declared law. They may, in the estimation of many, affect the standing of the individual who is guilty of them, and yet be not such as either to debase him in the eyes of the community, or exclude him from society.

Standard of  
military con-  
duct.

These are cases in which, it is believed, that a court-martial could not apply the stringent powers of this article of war for correction. The military community cannot expect, nor ought it to be expected of them, to preserve a higher tone of moral conduct than what is sustained by the higher orders of society. The means, therefore, conceded by the article in question, are not to be considered with reference altogether to such a purpose, for if such were the case, military officers would be subjected to a capricious standard of judgment, or to an ordeal which but very few men could bear!

Interpretation  
by Samuel of  
the British ar-  
ticle.

Mr. Samuel, in his treatise on "military law," when speaking of the similar article in the English military code, says—"the words 'officer and gentleman,' though in general to be understood as one, single, and indivisible term, appear not to be used so here. The misbehavior, entailing on it the penalty declared by this article, must be such, as I understand it, as to implicate in the first place the *officer*; that is, it must arise in some sort out of his office; and affect *incidentally*, only, the character of the *gentleman*."<sup>1</sup>

<sup>1</sup> Page 645.

But the writer must disagree with such an exposition of the article, if it is to be received as the interpretation of the American law :—nor does the practice accord with such an explanation of it, even in the British service.

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View of the  
83rd article of  
war of the  
American ser-  
vice

In the American army, a charge laid under this particular article of war, is *one, single, and indivisible term*, and cannot be broken by a finding of the court ; though, when such conduct as the breach of the particular article in question, is not expressly and exclusively laid in the charge, the court may, if a substantial military offence be shown by the evidence to have been committed, find a minor degree of guilt, as “conduct prejudicial to good order and military discipline ;” for it would certainly “be a strange doctrine to maintain, that because the court found less proved than charged, that no punishment should be awarded.”<sup>1</sup>

The degree to which certain acts may impugn one’s character, as conduct unbecoming an officer and a gentleman, is a matter of inference for the judgment of the court, and where such imputation is denied by the evidence, there must be an acquittal ; the facts charged may be clearly proved, and yet not involve the guilt alleged by the accuser in the charge. For the court are to try unofficerlike, and ungentlemanlike conduct, and to see that it be proved as it is alleged,—or to find such minor degree of guilt, under the restrictions before mentioned, as the nature of the evidence will warrant.

In every prosecution before a court-martial for conduct unbecoming an officer and a gentle-

<sup>1</sup> Hough, note 310, p. 499.



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man, the degree of the offence must be such as to reflect discredit upon the body of the army; or the nature of it such as to militate against the requirements of "good order and military discipline," before a legal conviction can be declared, or punishment awarded, according to the imperative language of the law, for that particular charge, or according to the discretion of the court, if a modified verdict be returned.

Acts, therefore, which are alleged in a charge of this character, but which by the court are divested of the imputation, which constitutes the crime, and which are, at the same time, not of such a kind as would of themselves constitute a breach of good order and military discipline, can of necessity involve no guilt—it can only be by such features that they are made cognizable by military courts. This is a matter for the attention and consideration of courts-martial, whenever a charge under the particular article of war now in review, is laid before them

It is readily perceived, that when deliberating upon a charge of "conduct unbecoming an officer and a gentleman," some officers, members of the court, who might be impressed with very high notions of personal and professional honor, or possessing a very refined and delicate perception of the proprieties which should distinguish a gentleman, would, without strictly regarding the intention or consequences of the law in question, pronounce a verdict of guilty, when in reality no *legal* offence had been committed. To prevent such errors of opinion, which involve the legal rights of others, though proceeding

from a noble sentiment, is the purpose of a just explanation of the article.

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The following case, quoted from McArthur, by Samuel, at page 650, will sufficiently illustrate the subject.

Case cited by  
McArthur.

"At a general court-martial held at the *Cape of Good Hope*, May, 1801, an officer was tried, charged with *scandalous, infamous conduct*, unbecoming the character of an officer and a gentleman, in having sent a charge of six hundred pounds, or thereabouts, against *Sir George Younge*, for a horse, which the said officer had declared to be a present to *Sir George*, when governor of the colony of the *Cape of Good Hope*.

"In respect to which charge the court-martial made a distinction; they *acquitted* the officer of *scandalous, infamous* behavior, but considered his conduct, nevertheless, as unbecoming the character of an officer and a gentleman, for which they adjudged him to be suspended from rank and pay for the space of six calendar months."

"The proceedings having been laid before his Majesty, the judge advocate general signified to *Lieutenant General Dundas*, the commander in chief of his Majesty's forces at the *Cape*, that his Majesty, laying out of the case any question touching either the right or the delicacy of the officer's claim to a compensation for the horse, concerning which the difference had arisen, points not within the cognizance of a court-martial, considered the adjudication as irregular, inasmuch as the court had *acquitted* him of the only imputation which could bring the business as a charge before them,—namely, of any *scandalous*

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or *infamous* behavior in the transaction; his Majesty could not, therefore, approve the sentence. At the same time it was signified, his Majesty was graciously disposed to attribute the error to the nice feelings of the officers who composed the court-martial, which had urged them to mark their dislike of a conduct which appeared to them not decorous."

The above case exemplifies what the writer has endeavored to explain,—that it is not all conduct which offends against the delicate proprieties and decorum of an officer and a gentleman, which can be held amenable to military law, but such only as while it impugns the character of an officer and a gentleman, at the same time casts upon the military community a shade of discredit and reproach.

In speaking of the same case (quoted above), Captain Simmons very justly remarks—

"An officer's sending an improper charge for a horse, taken abstractedly, could in nowise affect military discipline, and excepting as it might implicate the individual character of an officer, in a degree amounting to 'scandalous, infamous conduct,' no offence under the articles of war could be charged; since there is not any provision in the article for the cognizance of un-officerlike and ungentlemanly conduct (divested of a tendency to affect good order and military discipline), in any degree less than that involving infamy and scandal."<sup>1</sup>

The distinction thus observed upon by Captain Simmons, will undoubtedly be of aid in all questions brought before courts-martial for adju-

<sup>1</sup> Simmons, p. 376.

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dication, and which are laid under the eighty-third article of war. Thus a charge of unofficer-like and ungentlemanly conduct, when divested of all tendency to affect good order and military discipline, and at the same time involving no moral turpitude of such a kind as would reflect discredit upon the military community, cannot be deemed cognizable by a military court.

It may also be said that a similar interpretation should be given to the third article, sect. 1, of the "act for the better government of the navy of the United States," approved April 23, 1800—which declares, that "any officer or other person who shall be found guilty of — or any other scandalous conduct, tending to the destruction of good morals, shall, if an officer, be cashiered, or &c., &c."<sup>1</sup>

Third article for the government of the navy, to be similarly observed.

The manifest intention of this naval regulation, is the preservation of the purity and honor of the navy; precisely as in the land service, the article of war referred to is for the preservation of the morals of the army.

Fifthly.—*Hearsay is not evidence.*

Hearsay is not evidence.

This is a general rule, the propriety of which is manifest, from the following considerations,—that the statement is not made by the witness from his own knowledge, and therefore is not sanctioned by an oath. And that the party against whom the evidence is offered, can have no opportunity of examining into the means of knowledge of the party who made the statement. As every fact against a prisoner is required by the law to be proved on oath, and in

<sup>1</sup> Homan's Naval Laws, p. 59.

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ment, or has maintained a uniform consistency in his narration.<sup>1</sup>

Notoriety.

As to the notoriety of a particular fact or opinion, although it may appear to some extent to be in the nature of hearsay, is yet, when considered in regard to particular conduct, strictly a substantial fact, and therefore is to be proved from the knowledge of the witness, as the existence of any other fact is proved.

Sayings and  
acts of third  
persons.

What a third person has said or written is admissible in many cases, as amounting to an act done by him, or as showing his knowledge, or as evidence of his conduct. If for instance it is material to inquire whether a certain person gave a particular order on a certain subject, what he has said or written may be evidence of the order; or where it is material to inquire whether a certain fact, be it true or false, has come to the knowledge of a third person, what he has said or written may as clearly show his knowledge, as what he has done. So where it is relevant and material to inquire into the conduct of rioters or mutineers, what has been said by any of the party, in the act of rioting, must manifestly be admissible in evidence, as showing the design and intentions.<sup>2</sup>

Declarations of  
the parties.

Now in regard to receiving the declarations, or what was said by the parties during the continuance of the transactions, it may be affirmed that such is not objectionable as hearsay, because it is not such, or the relation of third persons unconnected with the fact; but the declarations of the parties to the fact, themselves, and

<sup>1</sup> Chitty's Crim. Law, 568.

<sup>2</sup> Roscoe's Crim. Ev., 21.

are therefore illustrative of its peculiar circumstances and character.<sup>1</sup>

But it is not necessary to enlarge on this branch of the subject of evidence. The principle that hearsay is not admissible is clear and determinate; and whatever exceptions are allowed to the rule, will, it is presumed, in the more simple cases, when compared with the complexity of civil proceedings, which arise for military adjudication, be easily perceived and admitted in practice.

Sixthly.—*Of Confessions.*

In regard to the degree of credit which a jury ought to attach to a confession, much difference of opinion has existed. The voluntary confession of the party is said, by some, to be reckoned the best evidence;—for, if a man swearing for his interest can give no credit, he must certainly give most credit when he swears against it: and that a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers.

On the other hand, it is said that hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured; words are often misreported through ignorance, inattention, or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative

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When hearsay is admissible generally developed by the particular cases.

Confessions.

What credit to be given to confessions.

<sup>1</sup> Roscoe's Crim. Ev., 20.

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evidence, by which the proof of plain facts may be, and often is confronted.<sup>1</sup>

Now, although it can hardly be conceived that a man would confess himself guilty of an act which he had not committed, so in opposition to the feelings and principles of human nature, yet there is no doubt that instances have occurred, in which innocent persons have confessed themselves guilty of crimes of the gravest nature.<sup>2</sup>

Growing out of such considerations, the following rules have been established as safe and just when such evidence is submitted for the decision of a jury.

Confession to be received with caution—good when the *corpus delicti* is proved.

Confessions ought always to be received with caution. And a voluntary confession made by a person who has committed an offence, is evidence against him, upon which he may be convicted, although the confession is totally uncorroborated by other evidence;—provided, the *corpus delicti*, that is, the act constituting the crime, be proved.

Confession to be made freely.

A confession is not admissible in evidence, unless it was made freely and voluntarily, and not under the influence of promises or threats. With regard to what is a promise or a threat, as will exclude a confession, it is laid down, that saying to the prisoner it will be worse for him if he does not confess, or that it will be better for him if he do, is sufficient to exclude the confession. Indeed, so strictly has the rule been applied, that the slightest hope of mercy held out to a prisoner, or a threat, for the purpose of inducing a confession, have been deemed suffi-

Promises or threats make it nugatory.

<sup>1</sup> Roscoe's Crim. Ev., 29.

<sup>2</sup> Ibid.

cient to make such confession nugatory. So, if a confession be made with a view, and under the hope of being permitted to give evidence for the public, or commonwealth, it is not admissible. Though, should the prisoner be admitted, and refuse to give evidence on the trial of his accomplices, he may be convicted upon such confession.

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It must be understood, however, that it is not every hope of favor held out to a prisoner that will render the confession afterwards made by him inadmissible;—the promise must have some reference to his escape from the charge. So, likewise, if a confession has been made after a threat or promise, but under such circumstances as to create a reasonable presumption, that the threat or promise had no influence, or had ceased to have any upon the mind of the prisoner, the confession is admissible. Thus, if the impression that a confession is likely to benefit him has been removed from the mind of the prisoner, what he says will be evidence against him. The prisoner's mind, in order to make a confession available against him, must be entirely free of all inducement, which either threats or promises might have created.

What is hope  
of favor.

When the promise or threat proceeds from a person who has no power to enforce it, and who possesses no control over the prisoner, a confession made under such circumstances is admissible.

Promise or  
threat by an un-  
authorized per-  
son.

The threats or promises must have reference to some temporal advantage in order to invalidate a confession: and, therefore, it has been held that a confession made to a chaplain, who

Must have ref-  
erence to some  
temporal ad-  
vantage.



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Confession obtained by artifice.

exhorted the prisoner to confess, as "before God it would be better for him to confess his sins," was admissible.

Other facts tending to establish guilt.

Where a confession has been obtained by artifice, without the use of promises or threats, it is admissible. Thus, if a confession were made under the mistaken supposition that some of the prisoner's accomplices were in custody, it would be good against him,—even though artifice had been employed to impress him with such belief. Although a confession obtained by means of promises or threats cannot be received, yet, if in consequence of that confession, certain facts, tending to establish the guilt of the prisoner, are made known, evidence of those facts may be received. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession, from which they may have been derived.

Only evidence against the party making the confession.

A confession is only evidence against the party himself who made it, and cannot be used against others;—therefore, the confession of the principal is not admissible in evidence, to prove his guilt, upon an indictment against the accessory.

Admissions by witnesses.

As to the question, whether the statement made by a witness upon his examination can be afterwards used against him,—the general rule is, that admissions made under compulsory process, are evidence against the party. So it is said that when a witness answers questions upon his examinations on a trial, tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes.

In general a person is not answerable, criminally, for the acts of his servants or agents, and, therefore, the declarations or confessions of a servant or agent will not be evidence against him. But it is otherwise where the declaration of an act done, relates to the ordinary course of the agent's employment—such will be evidence in a criminal as well as in a civil suit.

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Declarations of  
a servant or  
agent.

Another, and a most important rule is—that a confession, in criminal as well as in civil cases, made by a party, is to be taken together. There can be no doubt that if a prosecutor use the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner and the whole of the other evidence must be left to the jury, as in any other case, where one part of the evidence is contradictory to another. Although the whole of a confession is to be taken together, it does not follow that every part of it is entitled to equal credit. A jury may believe that which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing.

Confession  
must be taken  
together.

An admission on the part of the prisoner is not conclusive, and if it afterwards appear in evidence that the fact was otherwise, the admission will be of no weight. Thus, upon an indictment for bigamy, where the prisoner admitted the first marriage, and it appeared at the trial that such marriage was void, for the want

An admission is  
not conclusive  
—confessions  
void in law or  
false in fact.

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of consent of the guardian of the woman, the prisoner was acquitted. Such confessions are matters void in law, or false in fact.

General rule.

It is a general rule, that the whole of admissions or confessions must be taken together, so that what is given in evidence, be neither more nor less than what the prisoner intended. If a written paper be referred to, without which the confession is not complete, the contents of the paper ought to be shown before the statement can be used as evidence against the party. Or if a person says, he "did owe a debt, but that he had paid it," such admission will not be received as evidence to prove the debt, without being evidence also of the payment.<sup>1</sup>

Military regulations for courts-martial—plea of guilty.

Although a plea of guilt is a confession in the fullest degree, yet there have been military regulations issued for the guidance of courts-martial in such cases, intended solely for the benefit of the prisoner, and the assistance of the revising authority. Such rules or regulations are not to be understood as imposing new principles or laws of evidence, because independent of statutory authority, no rules which conflict with those recognized by the courts of law, could in that sense be binding; and therefore, although courts-martial should disregard such instructions and confirm the plea of guilty, notwithstanding the rejection of all corroborating evidence, the sentence resulting therefrom, if confirmed and acted upon, and not otherwise illegal, could not expose the members of the court-martial to any penalty, or any proceeding in a court of common law.

Disregard of them a breach of duty.

<sup>1</sup> Vide Roane's Crim. Ev., title "Confessions," and *Fallge Evidence*.

vet would be viewed as a breach of military duty.

By the several acts of congress, having in view the regulation of the military establishment, is the jurisdiction of military courts determined, though the mode of conducting the proceedings may be declared by the general orders for the army. But the rules of evidence are only to be ascertained by reference to the acknowledged or established maxims of the common law courts.<sup>1</sup>

4. Witnesses.—*Of the competency of witnesses.*

In a previous chapter, some remarks were made upon the deficiency in the military laws, owing to which a court-martial could not compel the attendance of a witness, if not a military person. It is, therefore, not necessary in this place to repeat the observations. In order, however, to remove objections on the score of expense, it is provided by the 987th paragraph of the general regulations for the army, that non-military persons who are regularly summoned to attend a court-martial as witnesses, shall be allowed a certain sum for travelling, and a per diem allowance for the time occupied in going to, attending on, and returning from the court.

It is a general rule that all persons may be witnesses who are capable of understanding, and may be presumed to feel the obligations incurred by a solemn appeal to the Almighty. And the law requiring all witnesses to be examined on oath or affirmation, it is to be inquired who are inadmissible, either from their inability to comprehend the former, or from their sup-

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Origin of military jurisdiction, and how rules of evidence are to be ascertained.

Competency of witnesses.

Reference to previous remarks. Witnesses to be remunerated for expenses incurred.

What persons inadmissible as witnesses.

<sup>1</sup> Simmons, p. 442.

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Inability to understand the obligations of an oath. Of children.

posed liability to slight and disregard the latter.<sup>1</sup>

*Inability to understand the obligations of an oath*, is the first objection to be considered. It seems that there is no time fixed wherein children are to be excluded from evidence, but that the reason and sense of their evidence are to appear from the questions propounded to them, and their answers. And therefore, a child of any age, if capable of distinguishing between good and evil, may be examined upon oath; but that a child of whatever age, cannot be examined unless sworn. This is now the established rule in all cases, civil as well as criminal, and whether the prisoner is tried for a capital offence, or one of an inferior nature.<sup>2</sup>

Where a case depends upon the testimony of an infant, it is usual for the court to examine him as to his competency to take an oath, previously to his going before the grand jury, and if found incompetent for want of proper instruction, the court will, in its discretion, put off the trial, in order that the party may, in the meantime, receive such instruction as may qualify him to take an oath.<sup>3</sup>

Deaf and dumb.

A person born deaf and dumb, though *prima facie* in contemplation of law an idiot, yet if it appear that he has the use of his understanding, he is criminally answerable for his acts; and is also competent as a witness. The communication between the court and such a witness, must be by a sworn interpreter, who is able by means

<sup>1</sup> Chitty's Crim. Law, 587.

<sup>2</sup> Roscoe's Crim. Ev., 94.

<sup>3</sup> Ibid, 94.

of signs and motions, to convey the questions and answers the one to the other.<sup>1</sup>

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Persons not possessing the use of their understanding, as idiots, madmen, and lunatics, if they are either continually in that condition, or subject to such a frequent recurrence of it, as to render it unsafe to trust to their testimony, are incompetent witnesses.

Idiots, madmen,  
and lunatics—  
intoxication.

An idiot is a person who has been *non compos mentis* from his birth, and who has never any lucid intervals, and cannot be received as a witness.

A lunatic is a person who enjoys intervals of sound mind, and may be admitted as a witness in *lucidis intervallis*. He must, of course, have been in possession of his intellect at the time of the event, to which he testifies, as well at the time of examination, and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination, for the events he has witnessed.

With regard to those persons who are afflicted with monomania, or an aberration of mind on one particular subject, (not touching the matter in question,) and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony; it being impossible to calculate with accuracy, the extent and influence of such a state of mind. So it is thought, that in the case of an insane person, in a lucid interval, it is a question difficult to decide, as to what degree of intellect will be necessary to enable him to give his evidence. A person in a state of intoxication is inadmissible.<sup>2</sup>

<sup>1</sup> Roscoe, 95.

<sup>2</sup> Ibid., and Chitty's Crim. Law, 588.

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Want of religious principle.

*Incompetency from want of religious principle.*

As the law requires witnesses to give their evidence under oath, or a solemn affirmation, and thus appealing to the Deity for the truth of their statements, it would necessarily follow, that such persons as do not believe in a God, and a future state of rewards and punishments, cannot be competent witnesses, inasmuch as such appeal impresses their mind with no obligation, and cannot possibly be any tie upon them.

Those persons therefore, who either from the weakness of their capacities, or their ignorance, have no idea of this awful sanction, or from erroneous speculations deny them, cannot be admitted to bear testimony in a court of justice. But it does not follow, however, that it is necessary to acknowledge or profess the Christian faith, in order to become competent witnesses; this was formally the case, but now infidels of whatever particular religion, provided they believe in the existence of a God, and that he will punish them in this world or the next, if they swear falsely, may be admitted as witnesses.

Form of oath.

The form of oaths under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of God.

Proper time to ask the question as to the form of the oath.

The most correct and proper time for asking a witness whether the form in which the oath, as about to be administered, is one which will be binding on his conscience, is before the oath is administered. But should the oath be administered in the usual way before the attention of the court or counsel is directed to it, the party is not to be precluded; but the witness may never-

theless be afterwards asked whether he considers the oath he has taken as binding upon his conscience.

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It is now a rule that when a person is tendered as a witness, and he is questioned to ascertain his competency to give evidence, in regard to religious principles, it will not be permitted to ask as to his belief in the Christian faith. The only question to be asked is, whether he believes in the existence of a God, the obligation of an oath, and a *future* state of rewards and punishments; or if he believes in a God who would punish falsehood either in this world or the next.<sup>1</sup>

Witness cannot be asked as to his belief in the christian faith.

*Incompetency from Infamy.*—Where a man has been guilty of certain offences the law has declared that his testimony shall not be received, on the ground of infamy of character, which the commission of such crimes indicates. It was formerly held, that where a man had undergone what was understood to be an infamous punishment, as the pillory—he was thereby rendered incompetent as a witness; but this rule has been long abandoned, and it is now determined that it is not the nature of the punishment, but of the offence which renders his evidence inadmissible.<sup>2</sup>

Infamy.

The crimes which incapacitate the party committing them from giving evidence are, treason, perjury, forgery, or every species of the *crimen falsi*, subornation of perjury, barratry, or bribing a witness to absent himself and not give evidence, and some others which need not be adverted to.

Crimes which incapacitate.

<sup>1</sup> Roscoe's Crim. Ev., 98.

<sup>2</sup> Ibid., 99.



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An incompetent person cannot have his affidavit read—except to defend himself.

Infamy, how proved.

How a witness is restored to competency.

Pardon does not always restore competency.

Conditional pardon. Exceptions to legal disabilities resultant and void.

A person incompetent to give oral evidence in court, on the ground of infamy, will not be allowed to have his affidavit read, unless it be to defend himself against a complaint.

Infamy must be proved, by the judgment of the court, where the conviction was had, and the court must be one of competent jurisdiction. Parol evidence cannot be given of it, and though the witness himself may admit that he was convicted of felony, this will not render him incompetent. It is not sufficient to give in evidence, the indictment and a verdict of guilty thereupon, without proving the judgment, for judgment may have been arrested. The judgment, or an examined copy of it must be produced in court. It must appear that a person was convicted before a competent tribunal.

When the party convicted has suffered the punishment awarded, he is again rendered competent except in cases of particular crimes, such as perjury and subornation of perjury.

The competency of a person, whose evidence has been rendered inadmissible by conviction, is restored by pardon, which has the effect of discharging all the consequences of the judgment. But where the disability is not merely a *consequence* of the judgment, but is a *part* of the judgment, pardon cannot restore competency, though a legislative act may.

Where a convict has served out his time, his competency may be restored at any time after by a pardon.

The executive may extend his mercy on whatever terms he pleases, and annex to his pardon any condition that he thinks fit, whether

precedent or subsequent, and on the performance of that condition, the validity of the pardon will depend. It must therefore be proved that the condition has been performed. A proviso in the pardon, excepting all legal disabilities, is repugnant and void.

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It is thought that a person who has been convicted by a foreign tribunal of an offence incurring infamy, and pardoned by the sovereign authority in that country, is admissible as a witness here, if the laws of the foreign country allows the competency of the party to be restored in that manner.

Of foreign tribunals.

The competency of a witness may be restored by reversal of judgment—and therefore, if a conviction and judgment are read on the one side to show the witness incompetent, they may be answered on the other by reading a reversal of the judgment upon writ of error.

Reversal of judgment restores competency.

Desertion, though a high crime, is not deemed such an offence as renders the one who has committed it incompetent. It may, however, be considered as affecting the credibility of the witness upon proof of conviction. And it may be observed that were the crime such as to destroy the competency of the offender, such in almost every case would be restored, as the witness would either have suffered the punishment awarded for the offence, or have received a pardon.

Desertion does not make a witness incompetent.

*Incompetency from Interest.*—It is not necessary for the purposes of military justice to enter fully into the question of interest which may disqualify a witness.

Interest.

When a person is called as a witness, he may

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- be rejected on the ground of a supposed want of integrity. But the interest must be such as the law recognizes; and the bias, arising from the witness standing in the same situation as the party by whom he is tendered, is not sufficient. Nor is a man incompetent because he is personally interested in a similar question to that upon which he is called to give evidence.

Expectations—  
rewards.

The expectation of a benefit, not necessarily and legally flowing from the event of the proceeding, does not render a witness incompetent—as the promise of a pardon. So in prosecutions where there are rewards, although the reward can only be the effect of the conviction, the prosecutors are competent witnesses—and yet such persons may be said to be interested in the event of the cause. And where a party is entitled to pardon, provided another offender be convicted on his testimony, the party so entitled is a competent witness.

Wager.

If the witness lay a wager that he will convict the prisoner, he is still competent though it goes to his credit.

Prosecutor is a  
competent witness.

As a general rule, the prosecutor or party injured, is a competent witness in criminal prosecutions; and this rule is founded on reasons of public policy.

Witness whose  
signature has  
been forged.

A party whose signature has been forged is now considered competent for the prosecution, though formerly a different practice prevailed.

Conviction not  
evidence for the  
witness in an-  
other proceed-  
ing.

Some of the cases on the subject of the competency of witnesses in criminal proceedings, were decided upon the idea that the conviction might be afterwards evidence for the witness in another proceeding; but it is now settled that the record

of a conviction will not be received as evidence, either at law or in equity, in favor of the party upon whose testimony the conviction was procured.<sup>1</sup>

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Informers, or persons who are entitled, under the general regulations for the army, to a reward for the apprehension of deserters are competent witnesses.<sup>2</sup>

Informers are  
competent.

The evidence of persons who have been accomplices in the commission of the crime with which the prisoner stands charged is, in general, admissible against him; and this rule is founded on necessity, since if accomplices were not admitted, it would frequently be impossible to find evidence to convict the greatest offenders. In strictness, there does not seem to be any objection to the admitting the witness at any time before conviction.

Evidence of ac-  
complice admis-  
sible.

Where several have been joined in the same indictment, and the case has proceeded against all the prisoners, but no evidence appears against one or more of them, the court will, in its discretion, upon the application of the prosecutor, order them to be acquitted, for the purpose of giving evidence against the rest. This procedure cannot be exactly followed by military courts, from the necessity of subsequent approval of the decision of the court. But the court-martial might, having decided one or more cases, where there was no evidence to convict, adjourn for such time as would be necessary for confirmation, and then re-assemble and proceed with the other cases. Should a prisoner desire to avail himself of the testimony of one involved in

Where several  
are joined in  
the same in-  
dictment.

<sup>1</sup> Roscoe's Crim. Ev., 106.

<sup>2</sup> Genl. Reg., Par. 123.

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Prisoner to apply for separate trial to obtain the testimony of one involved in the same charge.

Person not joined in same indictment is competent.

Accomplice having the promise of pardon to testify.

Where testimony of accomplice is uncorroborated.

Evidence of a *socius*.

Accomplice proceeded against for other offences.

the same charge, he would, on the receipt of the copy of the charges, urge the necessity of a separate trial, to the authority ordering the court-martial, and if not attended to, an application to the court would still be open.<sup>1</sup>

An accomplice, not joined in the indictment, is a competent witness for the prisoner, in conjunction with whom he himself committed the crime. And where they are severally indicted for the same offence the one may be called for the other. But persons collectively arraigned are incompetent for each other.

An accomplice, having the promise of pardon to give evidence against a confederate, is not disabled; it may affect his credibility, but will not destroy his competency.

A conviction on the testimony of an accomplice, uncorroborated, is legal. His credibility, and the probability of his testimony is for the jury to consider; but such testimony should be received with great caution; and the practice is, where such evidence is produced, unsupported by other confirmatory evidence, to acquit the prisoner.

Although in practice, in order to give it effect, the evidence of a *socius* requires confirmation, it is obvious that it cannot be required to be confirmed in every particular, for if that were requisite his evidence would be better omitted altogether.<sup>2</sup>

After giving his evidence, but not in such a way as to entitle him to favor, an accomplice may still be indicted for the same offence; and though he may have conducted himself properly,

<sup>1</sup> Simmons, p. 430.

<sup>2</sup> Roscoe's Crim. Ev., 120.

he is liable to be proceeded against for *other* offences: with respect to other offences, therefore, the witness is not bound to answer on his cross-examination.

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In criminal, as well as in civil cases, persons who have become bail are incompetent witnesses for the defence,—though the bail may be changed to make them good witnesses. And so, likewise, where a pecuniary or other interest debars a witness from giving evidence, the disability may be removed by a release or other proper mode.<sup>1</sup>

Bail is incompetent, may be released.

*Husband and wife.* Husband and wife are, in general, incompetent witnesses, either for or against each other, on the ground partly of policy, and partly of identity of interest. The circumstance of one of the parties being called *for*, or *against* the other, makes no distinction in the law. When admissible *against*, the testimony is likewise admissible *in favor* of the other. It is also said, that where the relation of husband and wife has once subsisted, the one is inadmissible for or against the other, even after the relation has ceased, with respect to matters which occurred during coverture. Thus a woman divorced, and married again, cannot be called to prove a fact either for or against her former husband;—and this because the law had created a confidence which the misconduct of neither party should be permitted to break.

Husband and wife, mutually incompetent.

Where the conjugal relation has once subsisted the incapacity endures.

The lawful husband and wife only are excluded; therefore, for instance, on an indictment for bigamy, *after proof of the first marriage*, the second wife is a competent witness against the

The marriage must be lawful to make the parties incompetent.

<sup>1</sup> Roscoe's Crim. Ev., 111.

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husband, for the marriage is void. So the taking away and marrying a woman contrary to her will, will not make her an incompetent witness against the husband; for acts of violence are void in law. But if she afterwards assent to the marriage, by a free cohabitation with him, she would not be admitted as a witness.

A woman who has cohabited with a man as his wife, but is not so in fact, is a competent witness for or against him.

Cases where  
the husband and  
wife are not  
precluded.

It is not in every case in which the husband or wife may be concerned, that the other is precluded from giving evidence. The rule seems to be now, that where the evidence of the wife did not directly criminate the husband, and never could be used against him, and where the judgment founded upon such evidence could not affect him, the evidence was admissible.<sup>1</sup>

Upon the same principle, where the husband or wife has been called by one party, the wife or the husband may be called by the other, to contradict the statement, for no advantage can be taken against either party of the contradictory testimony thus given.<sup>2</sup> Thus it has been ruled, that a wife may be a witness, in an action between third persons, not immediately affecting the interests of the husband, though her evidence may possibly expose him to a legal demand. But she would not be admitted as a witness, nor could her evidence in the first suit be produced against her husband, if an action should be brought against him.

There are exceptions, however, to the general

<sup>1</sup> Roscoe's Crim. Ev., 113.

<sup>2</sup> Ibid.

rule which regulates the competency of husband and wife as witnesses for each other, which necessity and strict justice demand.

A wife, therefore, is a competent witness against her husband, in respect to any charge which affects her liberty or person. Thus in trials where the crime is a violence done by one against the person of the other, the wife may be a witness against the husband, and the husband against the wife.<sup>1</sup>

The rule last stated is one which necessity has introduced, though the principle seems to have been lost sight of in a case which occurred in 1840-1.

Lieut. T., of the Artillery, was arraigned before a general court-martial which assembled at Detroit, upon a charge of "conduct unbecoming an officer and a gentleman," and among other facts specified, he was charged with violence towards his wife, by striking, &c. In relation to this particular part of the accusation, the prisoner, in his defence, presented his wife as a witness, who was immediately objected to as being incompetent to testify in the case. The question was argued on the part of the prosecution, and also on the defence, and the court having taken some time for deliberation, finally decided to admit the witness, and she was accordingly sworn, and gave in her evidence, which was a positive denial of the act charged against her husband.

It is thought that in this case the court-martial violated the rule of evidence, which excludes husband or wife, where the other is a

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Exceptions to the general rule.

Competent in trials, for violence by one against the other.

Erroneous practice,—case of Lieut. T.—

<sup>1</sup> Roscoe's *Crim. Ev.*, 114—and Note to 1 *Inst.*, Book I., ch. x., p. 137.



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party. It is true that the exception named above, would permit the evidence of the wife where the suit is against her husband for violence offered to her person; yet it is to be remembered, that it is also when the object of the prosecution is for her safety, and not in cases in which the question of fact may be incidentally noticed to substantiate another charge. The purpose of the trial, to which reference is now made, was not for the vindication of the personal rights, or personal safety of Mrs. T., but simply for the preservation of military morals, good order and discipline. The high interests that she had for the exculpation of her husband, ought not to have been tempted on the one hand, nor the confidence of conjugal life permitted to be violated on the other.

No relation but that of husband and wife excludes.

No other relation but that of husband and wife, excludes from giving evidence; the testimony may be suspicious, but the witness not incompetent.

Servant.

A servant is a competent witness for or against his master, he having no direct interest; but in a prosecution against a master, from the neglect of the servant, the servant is not competent, as he may subsequently be proceeded against by the master, in an action for damages for the neglect.<sup>1</sup>

Disability of counsel. Interpreter.

There is a species of disability to give evidence, which arises merely from a temporary relation, and is confined in its effects to the circumstances disclosed under its sanction. It arises from the situation in which a counsel or attorney stands to his client, and the *confidence* which is neces-

<sup>1</sup> Phillips' Ev.

sary for every one to repose in his legal advisers. The law will not therefore compel, nor even suffer those who are thus employed, to disclose any facts stated to them confidentially in the way of their profession, even after the cause is entirely concluded. An attorney is not bound to obey a *subpœna duces tecum*, to produce papers against his client, on an indictment for perjury. The retainer for a counsel for a cause, is in the nature of a privileged communication. And this rule extends also to an interpreter who may be employed, on the part of one ignorant of the language, to communicate his instructions to his attorney. And the rule applies to all cases where the party applies for professional advice; and it also extends to facts which the attorney becomes acquainted with in the character of an attorney, although the communication was not made by the client,—such as communications made by third persons, who accompanied the client when he came to consult the attorney; and to the contents of a written instrument, which he has by delivery from his client.

But this indulgence does not apply to cases where the witness, though a professional man, was consulted merely as a friend, without being engaged to conduct the proceedings. Or where a person has been consulted on the supposition that he was a solicitor. Counsel may be required to give evidence of anything which they knew before being retained, and of that which was communicated after the retainer had ceased.<sup>1</sup>

Privilege does not extend to friends. Counsel to give evidence when —

If a counsel or attorney be called as a witness

<sup>1</sup> Roscoe's Crim. Ev., 144, 145.

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Counsel to be  
cross-examined.

by his client, he is not protected from cross-examination as to the point upon which he has been examined in chief, although it was matter of confidential communication. But such cross-examination must be confined to the same matter, and must not extend to other points in the same cause.<sup>1</sup>

Negroes, as to  
the competency  
of.

There is another class of persons, in relation to whom questions of competency have arisen before courts-martial. These persons are negroes, or of African blood ; and it was upon such grounds, that the objections to their competency were based.

Case of Dr. Fel-  
lows, U. S. A.

In the case of Doctor B. F. Fellows, assistant surgeon in the army, who was tried at Fort Niagara, N. Y., October 1838, this question arose. In the course of the defence, the accused presented a coloured person to be sworn as a witness, upon which a member of the court objected to him as being incompetent.

The judge advocate remarked briefly, that the person proffered as a witness, was certainly competent, and if any objection was to be made to him, it could only go to his credit.—That neither the laws of the United States, nor those of the state of New York excluded such evidence, and that therefore the court-martial, unless other objections to his competency than the one urged was presented, must also receive it.

The court being cleared, it was decided after due deliberation, that the person was a competent witness, and he was accordingly sworn. The proceedings of this court were afterwards approved

<sup>1</sup> Chitty's Crim. Law, pp. 605, 6, 7.

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Another case which excited considerable interest, and which was made the subject of grave deliberation by one of the executive departments of the government, arose in the naval service in the following year. It was as follows:—

Lieutenant George Mason Hooe, of the U. S. Navy, was tried on board the U. S. ship *Macedonian*, in the Bay of Pensacola, on the 18th of March, 1839. In the course of the trial, one or more negroes, seamen in the service of the United States, were sworn on the part of the prosecution and gave evidence. To these witnesses the defendant objected, that by the laws of Florida, such persons (coloured,) were not competent to testify against a white person; the objection, however, was overruled by the court-martial. The trial having been completed, and sentence pronounced, Lieutenant Hooe appealed to the navy department, urging the same objection, as sufficient to vitiate the proceedings, or annul the judgment of the court. The subject being one which awakened the feelings of many persons, as a question of right flowing from the institution of slavery as acknowledged in some of the states, it soon became a theme of public and political discussion, and under such circumstances the question was referred for decision to Mr. Gilpin, attorney general of the United States. This officer decided—"that the testimony given by the negroes was not material to the finding of the court, and therefore considered the inquiry in regard to the objection itself unnecessary."<sup>1</sup>

Case of Lieut.  
Hooe, U. S. N.

Opinion of At-  
torney General,  
Mr. Gilpin.

It will be perceived that the opinion given

<sup>1</sup> *Opinions*, p. 1315. April 27, 1840.

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above avoided entirely the direct question, and was based upon a principle of the law of evidence, which required no reference. The decision consequently left the question as open as before. In the absence of the attorney general, the question of the competency of the negroes was referred to the district attorney of the United States for the District of Columbia, the late Francis S. Key, Esq. In the opinion then given, Mr. Key said:—

Opinion of U. S.  
District Attor  
ny. F. S. Key.

“The accused objected that by the laws of Florida, where the court-martial was held, such persons (coloured,) are not competent to testify against a white person; and he therefore contended that they should be, in like manner, excluded from testifying on courts-martial. Such a consequence would not follow from the law of Florida. The officers composing the court were bound to admit the witness, unless some legal disqualification was shown. This could only be by a law of congress. Whether it be right that there should be a law requiring courts-martial of the United States to reject all such witnesses as are disqualified by the laws of the state or territory where the court may be held, is a question for congress alone. Till they enact the disqualification, it cannot be enforced.”<sup>1</sup>

The proceedings of the court-martial in this case were approved; and so far therefore as the action of the department, and the opinion of the law officer of the government may be considered, the question has been determined.

As it is a subject upon which the minds of

<sup>1</sup> See Document No. 244, House of Representatives, Navy Department, 26th Congress, 1st Session.

many persons in the free and slave holding states are directly at variance, and one also which from the circumstances attending slavery at the present day, cannot be approached without more or less danger, certainly of agitation and violence, the writer would not recommend a course of procedure by courts-martial either in accordance with, or in direct opposition to the views expressed in the above opinion; but would leave it for the discretion of the courts themselves, to be governed by the same rules which regulate the United States ordinary courts of law, and which are in unison with the laws of evidence of the particular states or territories in which they may be held.

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Mode of proceeding recommended.

*Credibility of witnesses.* Where a witness is not incompetent by reason of falling within some of the rules which have been treated of in the foregoing pages, he may nevertheless not be entitled to full credit, and therefore his integrity as such may be impeached. This may be done by disproving the facts stated by him, by cross-examination, by producing the record of his conviction for some crime, or by showing by his general character that he is unworthy of being believed on oath. It is obvious that though a pardon, or the endurance of the punishment may restore the competency of a witness, yet it cannot operate with equal conclusiveness to retrieve his credibility; the proof of the conviction of crime, may more or less influence the degree of confidence to be placed in his testimony.

Credibility of witnesses.

The credit of a witness cannot be impeached, as to particular parts of his conduct, by other witnesses, but by reference to his general char-

Impeachment of credit of witness.

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acter: and this upon the ground, that it cannot be expected that a man is prepared to answer for particular acts without notice.

Statements, or a letter written, or a deposition signed by a witness at a former time, may be used to contradict the testimony given by him; but the conviction before a magistrate, purporting to set out the deposition of a witness is not evidence for this purpose, because the recital of it may be erroneous.

Impeachment  
by evidence of  
general char-  
acter.

When it is intended to impeach a witness by evidence of his general character, the usual manner is, to inquire whether the witnesses have the means of knowing it, and whether from such knowledge they would believe him on oath.

Opposite party  
may cross-ex-  
amine.

The party whose witness is impugned, may cross-examine as to the grounds for such opinion, or the opportunities which have been presented for judging: and these questions being replied to generally, a further cross-examination into particular instances is admissible. The party impeached may also bring evidence to rebut the attack, or to attack the character of the impeaching witness.<sup>1</sup>

Examination of  
witnesses, pro-  
per time to ob-  
ject.

*Examination of witnesses.* The proper time to object to the competency of a witness is, when he is called, and before being sworn; although, in general, the competency of a witness may be objected at any stage of a case. A party who is cognizant of the interest of a witness, at the time he is called, is bound to make his objection in the first instance. After a witness has been examined and cross-examined, and has

<sup>1</sup> Phillips' Ev

left the box, and is recalled for the purpose of having a question put to him, it is too late to object to his competency.<sup>1</sup>

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The party against whom a witness is called, may examine him respecting his interest on the *voir dire*, or may call other witnesses, or offer other evidence in support of the objection; the rule being now, that if the interest be satisfactorily proved the witness will be incompetent, though he may have ventured to deny it on the *voir dire*. These examinations on the *voir dire*, however, relate more generally to civil cases.<sup>2</sup>

Examination on  
the *voir dire*.

When the witness has been sworn, he is examined in chief by the party calling him, and it is a general rule that leading questions shall not be put to him by such party. But it is within the discretion of the court to admit such, for at times it would be impossible to come to the direct object in view; and it is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry.

Examination in  
chief. Leading  
questions.

The propriety of allowing leading questions, in order to establish a contradiction, has been questioned, and it is said that the most proper course is, to ask the witness who is called to prove a contradictory statement made by another witness, what that other witness said relative to the transaction in question, or what account he gave; and not in the first instance to ask in the leading form, whether he said so or so, or used such and such expressions.<sup>3</sup>

Where a witness examined in chief, by his conduct in the box shows himself decidedly adverse to the party calling him, it is in the discre-

Examination of  
a witness ad-  
verse to the par-  
ty calling him.

<sup>1</sup> Roscoe, 124.

<sup>2</sup> Ibid., 125.

<sup>3</sup> Ibid., 127.



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tion of the court to allow him to be examined, as if he were on cross-examination. But if he stands in a situation which, of necessity, makes him adverse to the party calling him, it was held that the party may, as a matter of right, cross-examine him. Somewhat similar to this, is the question whether, where a witness, called for one party, is afterwards called for the other, the latter party may give his examination the form of a cross-examination—and it has been held that he may; for having been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case. This, however, has been questioned by some.<sup>1</sup>

Form of cross-examination.

The form of the cross-examination depends, in a great degree, like that of an examination in chief, upon the bias and disposition evinced by the witness under interrogation. Should he appear adverse to the cross-examining party, great latitude with regard to leading questions may be admitted. It has been said, "you may lead a witness upon cross-examination, to bring him directly to the point as to the answer; but you cannot go the length of putting into the witness's mouth, the very words he is to echo back."<sup>2</sup>

Irrelevant questions. Witness not bound to answer.

Irrelevant questions will not be allowed to be put to a witness on cross-examination, although they relate to facts opened by the other side, but not proved in evidence. Nor will such questions be allowed to be put for the purpose of discrediting the witness by calling other witnesses to contradict him. The witness is not bound to

Roscoe's Ev., 127, and note, p. 128.

<sup>2</sup> Ibid.

answer irrelevant questions, but if he does, he may be contradicted.

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Counsel cannot assume that a witness has made a statement on his examination in chief, which he has not made, or put a question which assumes a fact not in proof.<sup>1</sup> Where a witness is called to produce a document, and he is not sworn, he is not subject to cross-examination.

Cannot assume  
a statement of  
fact not in proof

Witness produ-  
cing a docu-  
ment and not  
sworn.

A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must of course be confined to the subject matter of the cross-examination; and therefore all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness, if they be in themselves doubtful, and also the motive by which the witness was induced to use those expressions, will be admissible.<sup>2</sup>

Re-examina-  
tion.

A witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. And thus an accomplice who is admitted to give evidence against his associates, though bound to confess the whole of the subject matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not connected with the prisoner, for he is not protected from a prosecution for such offences.

Witness not to  
answer ques-  
tions subjecting  
him to penalties.

It is not necessary, in order to render the question objectionable, that it should directly criminate the witness; it is sufficient if it has a tendency to do so. The witness and not the

<sup>1</sup> Roscoe, 127, 128.

<sup>2</sup> Ibid., 128.

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Court to instruct the witness.

Witness to judge for himself.

Whether certain questions can be put which tend to criminate the witness.

court, is the proper judge whether a question put to him has a tendency to criminate him. The court will instruct him to enable him to determine, and will judge whether any direct answer to the question which may be proposed, will furnish evidence against the witness. If such answer would furnish a fact, which forms an essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. The witness must judge for himself, and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer.<sup>1</sup>

Whether questions, the answer to which would expose the witness to punishment, ought not to be allowed to be *put*, or whether the witness ought merely to be protected from *answering* such questions, does not appear to be settled. Contradictory judicial decisions have been made on this subject. Upon principle it would seem that questions tending to expose the witness to *punishment* may be *put*, as well as questions tending to degrade his character. The ground of objection in the first case is not that the question has a tendency to degrade him, but that advantage may be taken of his answer in some future proceeding against him, and the rule that no person is bound to accuse himself is urged. This objection, however, is completely removed by permitting the witness not to answer the question, for his silence would not in any future proceeding be any admission of guilt. The question may then be regarded as one sim

<sup>1</sup> Roscoe, 130,—Burr's Trial, 245.

ply tending to degrade the witness, and would come within the rule which appears to be now well established, that it may be *put*, though the witness is not compellable to give an answer, or that if he does give an answer, the party examining him must be satisfied with it.<sup>1</sup>

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Questions tending to degrade may be *put*—but witness not compellable to answer.

If the witness answers questions on the examination in chief, tending to criminate himself, he is bound to answer on the cross-examination, though the answer may implicate him in a transaction affecting his life. So if the witness begins to answer, he must proceed. And if a witness is cautioned that he is not compellable to answer a question which may tend to criminate him, but chooses to answer it, he is bound to answer all questions relative to that transaction.<sup>2</sup>

Witness bound to answer on the cross-examination.

If the witness voluntarily state a fact, he is bound to state how he knows it, though it criminate him.<sup>3</sup>

Bound to state how he knows a fact.

Where a witness is entitled to decline answering a question, and does decline, the rule is said to be, that his not answering can have no effect with the jury.<sup>4</sup>

When a witness declines answering, to have no effect with the jury.

The privilege of objecting to a question, tending to subject the witness to penalties or punishment, belongs to the witness only, and ought not to be taken by counsel, who will not be allowed to argue it. The privilege is personal.<sup>5</sup>

Privilege of the witness to object to answering a question.

Whether a witness is bound to answer questions tending to degrade him, is a point, which has been differently judged. As such questions are put for the purpose of discrediting a witness,

If a witness is bound to answer certain description of questions.

<sup>1</sup> *Roscoe's Ev.*, 131.

<sup>2</sup> *Ibid.*, 132.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, 133.

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the doubt only exists where the questions put are not relevant to the matter in issue, but are merely propounded for the purpose of throwing light on the witness's character; for if the transactions to which the witness is interrogated form any part of the issue, he will be obliged to give evidence, however strong it may reflect upon his character. There seems to be some difficulty to fix a rule on this subject; for if witnesses were always protected in such cases, that is, from questions which may degrade them, many an innocent man might suffer. And on the other hand, if they were always compelled to answer such questions, it might prove an injury to the administration of justice, by allowing persons who came to do their duty to the public, to be subjected to improper investigation. The rule does not exclude the *question*, but merely decides that the witness is not bound to answer, where such questions are not relevant to the matter in issue.<sup>1</sup>

Witness making statements not expected.

Where a witness is called, and makes statements contrary to those which are expected from him, the party calling him may prove the facts in question by other witnesses. A party calling a witness cannot be allowed afterwards to discredit him by general evidence that he is not to be believed on oath. It does not appear to be well settled whether a party, calling a witness who gives evidence contrary to what is expected from him, may prove contradictory statements previously made by the witness.<sup>2</sup>

A party cannot discredit his own witness by general evidence.

Examination as to matters of opinion.

As to examination of opinion, the rule in general is, that a witness cannot be asked what his

<sup>1</sup> Rescoe's Ev., 134, 135.

<sup>2</sup> Ibid., 136.

opinion upon a particular question is, since he is called for the purpose of speaking as to *facts* only; yet, where matter of skill and judgment is involved, a person competent to give an opinion may be asked what that opinion is.<sup>1</sup>

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Professional men are to state facts and opinions within the scope of their professions, not to give opinions on things of which the court can as well judge.<sup>2</sup>

Professional men, state facts and opinions within the scope of their professions.

<sup>1</sup> Roscoe's Ev., 136.

<sup>2</sup> Ib., note, 146.



## APPENDIX.

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No. 1.

### *Form of Order for Convening a General Court-Martial.*

Adjutant General's office,  
Washington, January 5th. 184

General Orders, }  
No. }

A general court-martial will assemble at ———, at 10 o'clock,  
A. M., the 10th instant, or as soon thereafter as practicable, for  
the trial of ——— and such prisoners as may be brought before it.

### *Detail for the Court.*

- |                  |       |                            |
|------------------|-------|----------------------------|
| 1. Col. A. B.    | . . . | 1st Regiment of Artillery. |
| 2. Col. N. M.    | . . . | 2nd Regiment of Dragoons.  |
| 3. Major W. C.   | . . . | 2nd Regiment of Infantry.  |
| 4. Major T. O.   | . . . | 5th Regiment of Infantry.  |
| 5. Captain S. B. | . . . | 1st Regiment of Artillery. |
| 6. Captain W. L. | . . . | 2nd Regiment of Artillery. |
| 7. Captain N. S. | . . . | 4th Regiment of Infantry.  |
| 8. &c. &c. &c.   | . . . |                            |

Captain S. W., of the 2nd Regiment of Artillery is appointed  
the Judge Advocate for the Court.

Should any of the officers named in the detail be prevented from  
attending at the time and place specified, the court will neverthe-  
less proceed to, and continue the business before it, provided, the  
number of members present be not less than the *minimum* pre-  
scribed by law;—the above being the greatest number [*when the  
court is composed of less than thirteen members*] that can be con-  
vened without manifest injury to the service. [*This last sen-  
tence to be always inserted in the like case.*]

By command of Major-General S.

R. J.

Adjutant-General.



## No. 2.

*Form of Order, or Precept, for Convening a Naval General Court-Martial.*

Navy Department, January 5th, 184

By virtue of the authority contained in the Act of Congress, "for the better government of the Navy of the United States," approved, April 23, 1800, a Naval General Court-Martial is hereby ordered to convene at ———, on board the United States ship ———, on the 1st day of February 184—, or as soon thereafter as practicable, for the trial of ——— (or) of such persons as may be legally brought before it.

The Court will be composed of the following officers;—any five of whom are empowered to act, viz.

Captain W. C. B.  
 Captain D. T.  
 Captain W. B.  
 Captain G. R.  
 Commander H. W. O.  
 Commander S. L. M.  
 Lieutenant B. D.  
 Lieutenant F. B. O.

And W. N. R. of ——— is hereby appointed the Judge Advocate.  
 A. P. U.

Secretary of the Navy.

## No. 3.

*Form of the Proceedings of a General Court-Martial.*

Proceedings of a General Court-Martial convened at ——— by virtue of the following order, viz:—

(Here insert the order.)

——— o'clock, A. M., January 10, 184

The Court met pursuant to the above order:—Present.

Col. A. B.	.	.	.	1st Regiment of Artillery.
Col. N. M.	.	.	.	2nd Regiment of Dragoons.
Major W. C.	.	.	.	2nd Regiment of Infantry.
Major T. O.	.	.	.	5th Regiment of Infantry.
Captain S. B.	.	.	.	1st Regiment of Artillery.
&c. &c.	.	.	.	—————

Captain S. W., 2nd Regiment of Artillery, Judge Advocate.

Captain S. M., 1st Regiment of Infantry, the accused, also present.

The Judge Advocate having read the order convening the court, asked the accused, Captain S. M., if he had any objection to any member named therein, to which he replied,—

*(If any challenge is made it must be now and to one member at a time.)*

The Court was then duly sworn by the Judge Advocate, and the Judge Advocate was duly sworn by the presiding officer of the Court, in the presence of the accused.

*(It is at this stage of the proceedings that the accused makes his request for the privilege of introducing his counsel,—and will also, if he desire it, state his reasons for postponement of the trial. These matters being settled, the Court proceeds.)*

The charges were read aloud by the Judge Advocate.

Judge Advocate (*addressing the accused*) Captain S. M. "You have heard the charge, or charges preferred against you, how say you—guilty, or not guilty?"

To which the accused, Captain S. M., pleaded as follows:—

*(The Judge Advocate here gives notice, that should there be any persons present in court, who have been summoned as witnesses, they must retire and wait until called for.)*

CAPTAIN D. N., 2nd Regiment of Infantry, a witness on the part of the prosecution was duly sworn.

Question by Judge Advocate. \_\_\_\_\_?

Answer. \_\_\_\_\_

Question. \_\_\_\_\_?

Answer. \_\_\_\_\_

Cross-examined by the accused. \_\_\_\_\_?

Answer. \_\_\_\_\_

Question. \_\_\_\_\_?

By the Court. Question. \_\_\_\_\_?

Answer. \_\_\_\_\_

Question. \_\_\_\_\_?

Re-examined by the Judge-Advocate.

Question. \_\_\_\_\_?

Answer. \_\_\_\_\_

Question. \_\_\_\_\_?

Answer. \_\_\_\_\_

*(The examination of the witness being completed, his testimony is read over to him, and corrected if necessary—when the next witness is called. The Judge Advocate having presented all the evidence for the prosecution, states such fact, and announces that the prosecution is closed—when the accused enters upon the defence.)*

LIEUTENANT A. B., 1st Regiment of Artillery, a witness for the defence was duly sworn.

Question by the accused. \_\_\_\_\_ ?

Answer. \_\_\_\_\_

Question. \_\_\_\_\_ ?

Cross-examined. Question by Judge Advocate. \_\_\_\_\_ ?

Answer. \_\_\_\_\_

Question. \_\_\_\_\_ ?

Answer. \_\_\_\_\_

Question by the Court. \_\_\_\_\_ ?

Answer. \_\_\_\_\_

*(The evidence on both sides having been heard, the accused asks for time to prepare his final defence.)*

The Court adjourned to meet at 10 o'clock, A. M., on the — inst.

10 o'clock, A. M., ——— 184

The Court met pursuant to adjournment.—Present.

Col. A. B.

Col. N. M.

Major W. C.

Major T. O.

Captain S. B.

Captain S. W., Judge Advocate, and

Captain S. M., the accused.

The proceedings of yesterday were read over,—when the accused, Captain S. M., presented and read (or which was read by his counsel) the written defence (A) appended to these proceedings.

*(Should the Judge Advocate intend to reply, he would notify the Court, and ask for the requisite time for preparation.)*

The statements of the parties being thus in possession of the Court, the Court was cleared for deliberation, and having maturely considered the evidence adduced, find the accused, Captain S. M., of the 1st Regiment of Infantry, as follows :—

Of the first specification of 1st charge, . . . Guilty.  
 Of the second specification of 1st charge, . . . Not Guilty.  
 Of the third specification of 1st charge, . . . Guilty.  
 Of the **FIRST CHARGE**, . . . . . Guilty.

Of the first specification, 2nd charge, . . . Not Guilty.  
 Of the second specification, 2nd charge, . . . Not Guilty.  
 Of the **SECOND CHARGE**, . . . . . Not Guilty.

And the Court do therefore sentence the said Captain S. M., of  
 the 1st Regiment of Infantry, — to —

(Signed) A. B.,

Col. 1st Regt. Artillery, and President of the Court-Martial.

(Signed) S. W.,

Judge Advocate.

There being no further business before them,

The Court adjourned *sine die*.

(Signed) A. B.,

Col. 1st Regt. Artillery, and President of the Court-Martial.

(Signed) S. W.,

Judge Advocate.



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